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NO. COA00-1391

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 2002

STATE OF NORTH CAROLINA

v.

Forsyth County
No. 00 CRS 7228

JIMMY LEE BURGESS

Appeal by defendant from judgment entered 24 July 2000 by Judge W. Douglas Albright in Forsyth County Superior Court. Heard in the Court of Appeals 18 February 2002.

Attorney General Roy A. Cooper, III, by Assistant Attorney General C. Norman Young, Jr., for the State.

Lisa S. Costner for defendant-appellant.

EAGLES, Chief Judge.

Jimmy Lee Burgess ("defendant") appeals from the trial court's judgment on a jury verdict finding him guilty of first degree burglary. On appeal, defendant assigns error to the trial court's rulings on several of his pretrial motions and his objections to the State's closing argument. After careful consideration of the record and briefs, we find no prejudicial error.

The State's evidence tends to show the following: Benjamin Jones was living in a rented basement apartment in Lillie Price Strickland's home at Five West 25th Street in Winston-Salem, North Carolina. At approximately 1:00 a.m. on 2 February 2000, Mr. Jones

heard a noise at his basement apartment door. After hearing the noise twice, Mr. Jones looked out a window and saw a black male in the driveway.

Mr. Jones immediately picked up the telephone, walked upstairs, and called 9-1-1. While he was on the phone with 9-1-1, Mr. Jones went into Ms. Strickland's room and woke her up. While waiting for the police to arrive, Mr. Jones heard glass breaking from the direction of the patio. He looked towards the patio and saw the door open. At this point, Mr. Jones observed a person wearing a striped jacket enter the house and close the door. Mr. Jones, who was still on the phone with 9-1-1, notified the dispatcher that someone had entered the house. Immediately, the person with the striped jacket opened the door and exited.

Officer M.J. Mulgrew of the Winston-Salem Police Department responded to Mr. Jones' 9-1-1 call within two minutes of the call. Upon arriving at Five West 25th Street, Officer Mulgrew noticed defendant in the driveway, approximately one foot from a broken window. Officer Mulgrew got out of his vehicle and ordered defendant to remain. Defendant ran and Officer Mulgrew gave chase. After a short chase in which he never lost sight of defendant, Officer Mulgrew apprehended defendant, handcuffed him, and returned with him to Five West 25th Street. At the house, Mr. Jones stated that the striped jacket worn by the person apprehended by Officer Mulgrew was similar to the jacket worn by the person he saw earlier entering the house.

At the conclusion of his 10 July 2000 trial, the jury found defendant guilty of first degree burglary. The trial court sentenced defendant to 120 to 153 months imprisonment and entered judgment. Defendant appeals.

Defendant assigns error to the trial court's denial of several of his pretrial motions. Specifically, defendant argues that the trial court erred in denying his motion to continue, his motion for complete recordation, and his motion to suppress. We disagree.

First, defendant filed a pretrial motion to continue based on the absence of two subpoenaed witnesses. In denying the motion, the trial court found that

defendant had this information about the witnesses, was requested by [defense counsel] early on to divulge such information, and for reasons best known to the defendant he did not do so. Rather, he sat on this information and disclosed it at a very late date.

. . . .

In the view of the Court, this motion is on for the purpose of delay and defendant has not attended to his defense in a business-like manner and has not complied with his counsel's request for early disclosure of necessary information for his defense. This is a dilemma entirely of the defendant's making.

Defendant argues on appeal that the trial court's denial of his motion to continue denied him his constitutional right to have reasonable time to investigate and to prepare his case.

A motion to continue is ordinarily addressed to the sound discretion of the trial court and will not be disturbed absent a showing of abuse of discretion. See *State v. Beck*, 346 N.C. 750, 756, 487 S.E.2d 751, 755 (1997). When the motion raises a

constitutional issue, denial of a motion to continue is grounds for a new trial only upon a showing "that the denial was erroneous and also that [defendant's] case was prejudiced as a result of the error." *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982). "The constitutional guarantees of due process, assistance of counsel and confrontation of witnesses unquestionably include the right of a defendant to have a reasonable time to investigate and prepare his case. No precise time limits are fixed, however, and what constitutes a reasonable length of time for the preparation of a defense must be determined upon the facts of each case." *Id.* at 104-05, 291 S.E.2d at 656.

Here, the record reflects that defendant was arrested on 2 February 2000, and defense counsel was appointed on 4 February 2000. Defense counsel requested that defendant provide all relevant information at an early stage. However, defendant did not inform defense counsel of the existence of the two witnesses that would testify on his behalf until 27 June 2000 -- nearly five months after defendant was arrested and provided counsel, twenty-five days after he requested a speedy trial, twenty-two days after his trial date was set, and fourteen days before his 10 July 2000 trial. Additionally, a motion for a continuance should be supported by an affidavit showing sufficient grounds. *See id.* at 105, 291 S.E.2d at 657. Defendant's motion for a continuance was not supported by the required affidavit.

Accordingly, we hold that, on this record, defendant has not demonstrated prejudicial error. Thus, we conclude that the trial

court did not abuse its discretion in denying defendant's motion to continue.

Second, defendant filed a pretrial motion for complete recordation of the trial including bench conferences. The trial court granted defendant's motion in part, but denied defendant's request for the recordation of bench conferences. In so ruling, the trial court ordered:

Bench conferences will be excepted and will not be recorded unless otherwise directed by the Court. Other than that, every utterance of the Court from the bench in open court will be recorded. And the court reporter will make a true, complete, and accurate record of all statements from the bench and all other proceedings except arguments of counsel on questions of law and bench conferences.

Private bench conferences between trial judges and attorneys are not required to be recorded. See *State v. Cummings*, 332 N.C. 487, 497, 422 S.E.2d 692, 697 (1992). "If, however, either party requests that the subject matter of a private bench conference be put on the record for possible appellate review, the trial judge should comply by reconstructing, as accurately as possible, the matter discussed." *Id.* at 498, 422 S.E.2d at 698; see also G.S. § 15A-1241(c).

Here, defendant requested the recordation of bench conferences prior to the start of his trial, and the court denied the request. During the trial, the record reflects that at least two off-the-record conferences were held. However, defendant failed to request that the subject matter of the conferences be reconstructed for the record at the conclusion of each of the bench conferences.

Furthermore, defendant failed to allege, and the record fails to show, how he was prejudiced by the court's failure to record the subject matter of those bench conferences. In the absence of any prejudice, we conclude that the trial court's error was harmless beyond a reasonable doubt. See *State v. Pittman*, 332 N.C. 244, 252, 420 S.E.2d 437, 441 (1992).

Finally, defendant filed a pretrial motion to suppress a show-up identification in which Mr. Jones identified defendant's jacket. After the State assured the court that Mr. Jones would not be called upon to identify defendant, the trial court denied the motion.

Nevertheless, the matter arose again during Mr. Jones' testimony at trial. In response, the court held a *voir dire* of Mr. Jones after which it held that

the Court will not permit the witness to make an in-court identification of the defendant's person.

. . . .

And he may not make an eyewitness identification based on everything I've heard. He may, however, testify with respect to the circumstance of the attire of the person in [police custody] in comparison to the person he observed on the premises. And that's limited to strictly to testifying as to the similarities in the jacket.

Following this ruling, Mr. Jones testified that the jacket worn by the person in Officer Mulgrew's custody was similar to that worn by the person who earlier entered the house.

"Show-ups, the practice of showing suspects singly to witnesses for purposes of identification, have been criticized as

an identification procedure by both [our Supreme Court] and the U.S. Supreme Court." *State v. Turner*, 305 N.C. 356, 364, 289 S.E.2d 368, 373 (1982). "This identification procedure may be inherently suggestive for the reason that witnesses would be likely to assume that the police presented for their view persons who were suspected of being guilty of the offense under investigation." *Id.* "Pretrial show-up identifications, however, even though suggestive and unnecessary, are not *per se* violative of a defendant's due process rights." *Id.* In fact, "[a]n unnecessarily suggestive show-up identification does not create a substantial likelihood of misidentification where under the totality of the circumstances surrounding the crime, the identification possesses sufficient aspects of reliability." *Id.*

Here, Mr. Jones did not make an in-court identification of defendant. Instead, he testified with specific particularity that the person in police custody wore a striped jacket similar to the striped jacket worn by the person who entered the house. However, assuming *arguendo* that Mr. Jones' testimony about the jacket did identify defendant, we conclude that under the totality of the circumstances Mr. Jones' pretrial identification was sufficiently reliable to be admissible despite any alleged suggestiveness of the procedure.

Additionally, this Court has held that evidence relating to clothing that a defendant was wearing at time of his arrest was admissible where it was relevant in identifying defendant as the perpetrator. See *State v. Collins*, 35 N.C. App. 250, 252, 241

S.E.2d 98, 99 (1978). Accordingly, we hold that the trial court did not abuse its discretion in denying defendant's motion to suppress. Further, the court did not err in allowing Mr. Jones to testify regarding the striped jacket.

In his next assignment of error, defendant argues that the trial court erred in failing to rule on his objections during the State's closing argument. After careful review, we disagree.

G.S. § 15A-1230(a) governs the content of closing arguments to the jury. Control of the arguments by counsel rests primarily in the discretion of the trial court. See *State v. White*, 307 N.C. 42, 51, 296 S.E.2d 267, 272 (1982). "Generally, counsel is allowed wide latitude in the scope of jury arguments." *State v. Hill*, 347 N.C. 275, 298, 493 S.E.2d 264, 277 (1997). In fact, "[c]ounsel is permitted to argue the facts which have been presented, as well as reasonable inferences which can be drawn therefrom." *Id.*

Here, the State implied in its closing that defendant had been at Five West 25th Street for some period of time and that defendant may have worn gloves. Defendant objected to both statements and the trial court failed to rule. During the trial, Lillie Strickland testified that four separate places in her residence were broken into on 2 February 2000. Additionally, Officer Mulgrew testified that the police were unable to obtain any fingerprints. Thus, evidence in the record supports the inferences that defendant had been on the premises for an extended period of time and that defendant may have worn gloves.

While it is true that upon objection "the trial court has the duty to censor remarks not warranted by the evidence or law," *State v. Anderson*, 322 N.C. 22, 37, 366 S.E.2d 459, 468 (1988), the evidence here supports the State's statements in its closing. Accordingly, we hold that the trial court did not abuse its discretion in declining to rule on defendant's objections.

In sum, we conclude that defendant received a fair trial free from prejudicial error.

No error.

Judges McCULLOUGH and BIGGS concur.

Report per Rule 30(e).