NO. COA01-1508

NORTH CAROLINA COURT OF APPEALS

Filed: 1 October 2002

STATE OF NORTH CAROLINA

v. Buncombe County
No. 00 CRS 57583-84

DAVE TILLMAN WEBB

Appeal by defendant from judgments entered 15 February 2001 by Judge Zoro J. Guice, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 11 September 2002.

Attorney General Roy Cooper, by Assistant Attorney General Marc Bernstein, for the State.

Eric J. Foster, for defendant-appellant.

TYSON, Judge.

On 4 December 2000, a grand jury returned two separate indictments against Dave Tillman Webb ("defendant") for robbery with a dangerous weapon. The two charges were joined for trial. On 15 February 2001, a jury found defendant guilty of both robberies. The trial court sentenced defendant to two consecutive terms of 117 to 150 months.

I. Facts

A. Robbery of Robert Jones

At approximately 6:00 p.m. on 13 May 2000, Robert Jones (Jones) was using a drive-thru automated teller machine (ATM) in

Asheville when a man approached his vehicle and leaned in through the window. The assailant held a knife to Jones' throat and demanded money. Jones pushed the assailant out of the way, engaged the clutch on his vehicle, and rolled forward about twenty to thirty feet. The assailant took $100.00 belonging to Jones out of the ATM. Jones saw the man enter a maroon and white pick-up truck where another man was seated and drive off. Jones testified that the assailant was a white male who "had dark hair, about five-seven, roughly, 170 to 180 pounds, maybe. ... I would guess 35 [years old]. ... I did notice it looked like that he had a fake mustache on. He had on dark sunglasses, and it looked like he had a fake mustache on."

A couple of weeks after the robbery, Jones had been unable to positively identify any of the individuals in a photographic lineup as the assailant. Jones testified that he was sitting in the back of the courtroom on the morning of trial and saw an individual enter the courtroom unaccompanied. He immediately identified defendant as the man who robbed him. On *voir dire* testimony, Jones testified that he was "one hundred percent" certain that defendant was the man who robbed him on 13 May 2000. After hearing *voir dire* testimony and arguments on defendant's motion to suppress the identification, the trial court found "[t]hat Jones' identity of the Defendant, David Tillman Webb, as the individual who perpetrated the crimes against him is based on the events which occurred on May 13th, 2000 and on Jones' observation of the

Defendant at the time in question." The trial court allowed Jones to testify as to his identification of defendant as the assailant.

B. Robbery of Kevin Cole

At approximately 10:27 p.m. on 13 May 2000, Kevin Cole ("Kevin") was using an ATM and accompanied by his cousin, Matthew Cole ("Matthew") in the car. A man, later identified as the defendant, approached the vehicle, and demanded that Kevin "Forget the f---ing money, just drive off." Both Kevin and Matthew noticed defendant holding something in his hand. Matthew testified, "I thought he had a small caliber handgun." Kevin and the assailant struggled during which Kevin received a cut on his arm. The assailant fled with $100.00. Kevin testified that he saw a man waiting nearby in a maroon and silver truck who fled the scene soon after the robbery.

Defendant did not testify at trial but presented evidence including the testimony of Nancy Webb, defendant's wife. At the start of the State's cross-examination, Mrs. Webb claimed to have suffered a heart attack on the stand. She was unable to return to court to continue her cross-examination. The trial court, outside the presence of the jury, stated that the trial would continue, while holding the cross-examination open, but stated:

> if the State insists on it's [sic] right to Cross-Examination, that's something they are going to have to decide over the course of the evening, but if the State insists on cross-examining this witness, and they have a right to Cross-Examination, and if it turns out that she is unavailable for Cross-Examination, I don't know anything else

> to do except to strike all of her testimony that's been presented and instruct the jury not to consider it, as well as striking the testimony from one Brett Norman, I believe, who testified as to certain statements that she made to him and gave that testimony as corroborative evidence, but we can cross all of those bridges in the morning.

After defendant finished his case-in-chief, Mrs. Webb remained unavailable. The State waived the rest of the cross-examination of Mrs. Webb and proceeded with rebuttal evidence. The jury returned a verdict of guilty of both charges. Defendant appeals.

II. Issues

Defendant contends that the trial court erred: (1) in failing to instruct on the lesser included offense of common law robbery; (2) in denying defendant's motion to suppress the pretrial identification and in-court identification of defendant as the perpetrator; (3) in allowing the State's motion to join the charges for trial; and (4) in announcing it would strike the testimony of defense witnesses after one witness suffered a heart attack during her testimony.

III. Common Law Robbery Instruction

Defendant contends that the trial court erred in failing to instruct the jury on the lesser included offense of common law robbery. After defense counsel renewed and argued his motions to dismiss for insufficient evidence, the trial court asked whether there was any response from the State. The State stated: "Only if Your Honor wants to go ahead and give him a common law on that particular charge, I think that would be appropriate. The jury can decide if it's a dangerous weapon or not." The trial court then

denied defendant's motions to dismiss. After stating which jury instructions it intended to give, the trial court asked whether there were any requests for instructions from defendant. The only instruction defendant requested was for impeachment of a witness by proof of a crime. After the instructions were given to the jury, the trial court asked whether there were any requests for corrections or additions to the charge or whether there were any objections to the charge. Defendant's counsel answered "No, Your Honor."

A defendant waives his right to an instruction on a lesser included offense if he fails requests such an instruction or fails to object to the charge. N.C. R. App. P. 10(b)(2) (2002); *State v. Squalls*, 65 N.C. App. 599, 601, 309 S.E.2d 558, 559 (1983). Because defendant did not request an instruction on the lesser included offense of common law robbery and did not object to the jury instructions given, he has failed to preserve this issue for review on appeal. Defendant has also not asserted that the trial court committed plain error in failing to instruct on the lesser included offense. We overrule this assignment of error.

IV. Identification of Defendant

Defendant asserts that the trial court erred "by denying defendant's motion to suppress the unconstitutional pretrial identification of defendant and the in-court identification based upon it by the witness Robert Jones." We disagree.

"Identification evidence must be excluded as violating a defendant's right to due process where the facts reveal a pretrial

identification procedure so impermissibly suggestive that there is a very substantial likelihood of irreparable misidentification." *State v. Harris*, 308 N.C. 159, 162, 301 S.E.2d 91, 94 (1983). A positive identification must be suppressed only if the pretrial identification is "both (1) 'impermissibly suggestive' and (2) so suggestive that 'irreparable misidentification' is likely." *State v. Roberts*, 135 N.C. App. 690, 693, 522 S.E.2d 130, 132 (1999), *disc. rev. denied*, 351 N.C. 367, 543 S.E.2d 142 (2000) (*quoting State v. Pigott*, 320 N.C. 96, 99-100, 357 S.E.2d 631, 633-34 (1987)).

On 13 February 2001, Jones was present in the courtroom waiting for the trial to begin when he observed an unaccompanied individual walk into the courtroom about five feet away. He immediately identified defendant as the individual who perpetrated the robbery against him. There was no evidence that the State had placed Jones in the back of the room for the purpose of identifying defendant as he walked into court. The circumstances leading to the pretrial identification cannot be attributed to the State. We conclude that the pretrial identification was not impermissibly suggestive.

Presuming the pretrial identification was suggestive, it was not so impermissibly suggestive that there was a "substantial likelihood of irreparable misidentification." *Harris*, 308 N.C. at 162, 301 S.E.2d at 94. Our Supreme Court has established five factors for consideration in determining whether there is a substantial likelihood of misidentification: "1) The opportunity of

the witness to view the criminal at the time of the crime; 2) the witness' degree of attention; 3) the accuracy of the witness' prior description; 4) the level of certainty demonstrated at the confrontation; and 5) the time between the crime and the confrontation." *Pigott*, 320 N.C. at 99-100, 357 S.E.2d at 634 (*citing Manson v. Brathwaite*, 432 U.S. 98, 114, 53 L. Ed. 2d 140, 154 (1977)).

Here, defendant walked into the courtroom in plain clothes and unescorted. Jones immediately identified him as the perpetrator of the crime. Jones had previously been unable to positively identify the defendant from a photographic lineup in the weeks following the robbery. When talking with police in the weeks after the robbery, Jones stated that the perpetrator could be one or two of the people shown to him in the photographic lineup but that he would have to see them in person to be able to identify the individual. During *voir dire*, Jones testified that it was still light outside at the time of the robbery and that there was no obstruction of his view of the person perpetrating the crime. The trial court found that "Jones was able to ... get a clear view of the individual and make clear observations of the Defendant, or the individual perpetrating the crimes." Jones testified, "I'm a hundred percent sure" that the individual who walked in the door was the perpetrator of the robbery against him. Defendant had the opportunity to cross-examine Jones regarding his identification at trial and the lack of prior identification. The trial court

correctly denied defendant's motion to suppress the pretrial and in-court identification. We overrule this assignment of error.

V. Joinder for trial

Defendant contends the trial court erred "by allowing the Government's motion to join the unrelated offenses for trial." A defendant waives his right to sever joined offenses when he fails to make a timely motion for severance as required by statute. N.C. Gen. Stat. § 15A-927(a)(1) (2001).

"Two or more offenses may be joined in one pleading or for trial when the offenses, ..., 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). The trial court must consider whether the offenses are "so separate in time and place and so distinct in circumstances as to render the consolidation unjust and prejudicial to defendant." *State v. Bullin*, ___ N.C. App. ___, ___, 564 S.E.2d 576, 580 (2002) (citations omitted). "If in hindsight the court's ruling adversely affected defendant's defense, the ruling will not be converted into error. Defendant's remedy in this situation would be to make a motion for severance as provided by N.C.G.S. § 15A-927." *State v. Williams*, 355 N.C. 501, 530, 565 S.E.2d 609, 626 (2002) (citations omitted).

There are many transactional similarities between the two crimes. Both armed robberies were committed with the same *modus*

operandi: threatening drivers of vehicles who were getting money from drive-thru ATM machines. The robberies occurred on the same day within several hours of each other in the same city. Both crimes involved the same escape vehicle. The first robbery involved a "Swiss Army Knife" and the second robbery involved "a sharp object." Defendant never moved for severance nor objected at trial to the joinder of the charges. Defendant waived severance of the charges. The trial court correctly joined the charges for trial. We overrule this assignment of error.

VI. Witness

Defendant contends the trial court "erred by announcing that it would strike the testimony of a defense witness after she suffered a heart attack during her testimony." Defendant argues that the court violated his Fourteenth Amendment right "to present his own witnesses to establish a defense" when it made the announcement. We disagree.

During defendant's case-in-chief, defendant's wife completed her direct examination. After few questions during the cross-examination by the State, she claimed to have suffered a heart attack and was rushed to the hospital. Outside of the presence of the jury, the trial court stated that they would wait to see the status of the witness but that, if the State insisted on the right to cross-examine the witness and defendant's wife remained unavailable, the court would strike her testimony. After defendant presented his other witnesses, the State decided that it would waive cross-examination of Mrs. Webb. The jury never heard any

statement regarding the possibility of striking witnesses. Defendant was not deprived of the opportunity to present witnesses in his favor. Defendant was able to fully present the testimony of his witness without the State having the full opportunity to cross-examine her. This assignment of error is overruled.

VII. Conclusion

After a careful review of defendant's assignments of error and the arguments of counsel, we hold that the trial court did not err in the trial and sentencing of defendant for the crimes for which the jury convicted him.

No Error.

Judges MCCULLOUGH and BRYANT concur.

Report per Rule 30(e).