NO. COA01-1595

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

STATE OF NORTH CAROLINA

v.

BRANDY LYNN SHELTON

Alamance County
Nos. 00 CRS 50171
00 CRS 50174
00 CRS 57717

Appeal by defendant from judgment entered 3 May 2001 by Judge Ronald L. Stephens in Alamance County Superior Court. Heard in the Court of Appeals 19 September 2002.

Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.

Edwin L. West, III, P.L.L.C., by Heather Wells, for defendant-appellant.

CAMPBELL, Judge.

Brandy Lynn Shelton ("defendant") appeals from a judgment entered after a jury convicted defendant of various charges, including sexual offenses, larceny, burglary and kidnapping. On appeal defendant contends that the trial court erred by granting the State's motion to join the offenses against defendant to be heard in one trial. Defendant also argues that the trial judge erred by expressing an improper opinion and that he prejudicially misstated the law during jury selection. We disagree and find no error in the trial.

On 5 January 2000, defendant was arrested and placed in jail for the burglary, larceny, kidnapping, and rape of Sara Sykes ("Ms. Sykes"). Defendant was indicted on 30 May 2000 for first-degree rape, three counts of first-degree sexual offense, first-degree kidnapping, first-degree burglary, and felony larceny. Defendant remained in jail until his June 2000 trial, which resulted in a mistrial. After being granted a bond reduction, defendant posted bond and was granted pre-trial release on 1 August 2000. Less than one month later, on 28 August 2000, defendant was arrested for the 17 August 2000 burglary, sexual offense, and kidnapping of Elizabeth Holt Maynard ("Ms. Maynard"). On 26 March 2001, defendant was indicted for two counts of second-degree sexual offense, first-degree kidnapping, and first-degree burglary.

Before trial, the State moved for joinder in order to try defendant for the offenses committed against Ms. Sykes together with those committed against Ms. Maynard. The State's motion was allowed over defendant's objection. On 3 May 2001 a jury found defendant guilty of all the charges except the first-degree kidnapping of Ms. Maynard, which was dismissed. Thus, defendant was convicted of first-degree rape, three counts of first-degree sexual offense, first-degree kidnapping, first-degree burglary, felony larceny, and two counts of second-degree sexual offense. Additional relevant facts are set forth herein.

Defendant first assigns error to the trial court's granting of the State's motion to join the offenses against defendant to be heard in one trial. The State argues that this case meets the

statutory requirements for joinder and the trial court did not abuse its discretion in granting the State's motion. We agree.

Standard of Review

N.C. Gen. Stat. § 15A-926 provides:

> Two or more offenses may be joined in one pleading or 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) (2001). In considering a motion for joinder under N.C. Gen. Stat. § 15A-926(a), the trial court applies a two-step analysis to determine: (1) "if there is a transactional connection between the separate criminal offenses;" *Sate v. Hyatt*, 355 N.C. 642, 658, 566 S.E.2d 61, 72 (2002) (citation omitted) and (2) "if joinder of the offenses would hinder the defendant's ability to present a defense or deprive the accused of a fair trial." *Id.* at 658-59, 566 S.E.2d at 72 (citation omitted). The trial court considers various factors to determine if a transactional connection exists between the offenses. *State v. Williams*, 355 N.C. 501, 530-31, 565 S.E.2d 609, 627 (2002). "Two factors frequently used in establishing the transactional connection are a common *modus operandi* and the time lapse between offenses." *Id.* (citations omitted). Other factors considered are the nature of the offenses and any commonality of facts between them, as well as the unique circumstances of the cases. *State v. Montford*, 137 N.C. App. 495, 498-99, 529 S.E.2d 247, 250 (2000), *cert. denied*, 353 N.C. 275, 546 S.E.2d 386 (2000) (citation

omitted). Whether or not the offenses share a transactional connection is a question of law which is fully reviewable on appeal. *Id.* at 498, 529 S.E.2d at 250 (citation omitted). However, the "second part [of the analysis] is addressed to the sound discretion of the trial judge and is not reviewable on appeal absent a manifest abuse of that discretion." *Id.* For joinder by the trial court to be proper, a transactional connection between the offenses must exist as a matter of law. Once the trial court concludes that a transactional connection exists, it is within the trial court's discretion whether or not to allow the joinder depending on whether joinder "would hinder the defendant's ability to present a defense or deprive the accused of a fair trial." *Hyatt* at 658-59, 566 S.E.2d at 72. Even if this Court decides that the trial court was correct in determining that a transactional connection exists as a matter of law, we must still review the trial judge's exercise of discretion to determine if any abuse of discretion occurred. Here, we conclude: (1) that the trial court was correct in ruling that the offenses defendant committed against the two victims were transactionally connected; and (2) that the trial court did not abuse its discretion in allowing the joinder.

Offenses against Sara Sykes

The State's evidence showed that on 22 December 1999 at 1:15 a.m., defendant entered Ms. Sykes's home through a set of back doors that opened from the deck directly into her bedroom. Defendant was quickly upon the victim, put his hand over her mouth and threatened to kill her. Defendant forced Ms. Sykes to perform

oral sex on him, but could not achieve an erection. Defendant then performed oral sex on Ms. Sykes, penetrated her forcefully with his penis and then forced more oral sex. Holding some type of a painter's tool to her throat, defendant demanded money from the victim and forced her to the kitchen where he took money from her pocketbook. After forcing her back to the bedroom, he threatened to kill her and her family. Defendant then digitally penetrated and sodomized her and ransacked her room for valuables.

Defendant was then picked up by a car driven by a friend, to whom defendant admitted that he raped and threatened to kill Ms. Sykes. At trial, Ms. Sykes testified that her attacker "had on a baseball cap . . . a striped, button down the front oxford, . . . and jeans and hiking boots." As to the hat, Ms. Sykes testified that it was a neutral-colored, two-tone hat and "[i]t stunk." She said her attacker "took [the hat] off . . . [and] laid it on the bed." Ms. Sykes testified that her attacker's face "needed a shave . . . [and] his hair was short . . . like an old buzz cut."

After police located defendant, a detective found in his room a two-toned ball cap, which Ms. Sykes identified by sight and smell as the cap of her attacker. In defendant's bed, the detective found a paint scraper which Ms. Sykes identified as being similar to the one used as a weapon to threaten her.

Ms. Sykes testified that her attacker addressed her by her first name at one point during the night of the offenses. The State's evidence showed that defendant had been to the victim's house during the summer of 1997 when he helped paint her house.

The victim's husband died during the time the house was being painted. Later that summer defendant came uninvited to Ms. Sykes' home and asked her to dinner, which she declined.

Offenses against Elizabeth Holt Maynard

As to Ms. Maynard, the State's evidence showed that nearly eight months later, but less than three weeks after defendant was granted pre-trial release, defendant committed offenses against Ms. Maynard, a 64-year-old widow who lived alone. Defendant had also been to this victim's home before when he did work on her porch several years prior to this evening. When defendant was in jail for the rape of Ms. Sykes, he had talked to another prisoner, David Eller ("Mr. Eller"), who testified for the State. Mr. Eller testified that defendant asked Mr. Eller where he lived, which was in the house next to Ms. Maynard's house. Mr. Eller testified that defendant "said he had done some work for Ms. Maynard several years ago, or done some work on a porch or something like that."

On 17 August 2000 at about 1:15 a.m., defendant kicked in the door of Ms. Maynard's home and was quickly on top of her, as if he knew the exact location of her bed. Defendant then threatened to kill her, saying, "I have killed two women before. I put knives in their hearts." Defendant demanded money from her and sexually assaulted her by digitally penetrating her and performing oral sex on her. He told her he wanted to make love to her, but did not remove his pants because he was unable to achieve an erection. Despite being terrified, Ms. Maynard testified that she tried to play along and was able to get defendant off of her by offering him

a drink from the kitchen. As defendant opened a can of soda, the victim grabbed her purse and ran out of her house, got into her car and locked the doors. Defendant followed her and attempted to open her car door.

Ms. Maynard testified that when her attacker was in her bedroom, she could feel that "he felt like he had a goatee [and] [] [h]is hair had been cut short." When Ms. Maynard was in her car, she could see that he was a "white male" and that he was wearing "a red, blue and green muted color, vertical striped shirt, short-sleeve shirt, button down the front . . . [and] blue jeans." The victim then drove to her daughter's house and called the police, who found incriminating evidence at Ms. Maynard's house: a boot print on the victim's door which was later found to match defendant's leather work boots; a New York Yankees ball cap on the victim's bed; and the hair and DNA evidence in the hat was found to be microscopically consistent with defendant's hair and the DNA matched the DNA of cells taken from defendant.

Whether a transactional connection exists

Comparing the sets of facts of these cases, we conclude that a transactional connection exists, as argued by the State and determined by the trial court. Applying the factors set out above to determine if the offenses are transactionally related, we find that both sets of offenses have the following similarities: both were burglaries that occurred at approximately 1:15 a.m. against widows living alone; both were committed against older women at whose homes the defendant had previously worked; in both cases

defendant entered through the doors closest to the bedrooms, as if he knew the exact location of the beds so that he could be on top of the women immediately; in both cases he threatened to kill, stated that he killed before, and demanded money; both cases involved defendant being unable to achieve an erection, performing oral sex upon the women, and digitally penetrating the women; in both cases he wore a ball cap, which he took off and laid on the bed.

Defendant argues that no such transactional connection exists because in one case defendant did not use a weapon as he did in the other; he entered through the back door in one and through the front door in the other; one occurred in the City of Burlington, while the other was in a rural area of Graham; and the lapse of time between the offenses is large.

Defendant's sole argument that possesses any weight is that the time lapse between the offenses is substantial as compared to some past cases in which the North Carolina Supreme Court has held that a transactional connection exists between offenses committed against different victims. *See State v. Moses*, 350 N.C. 741, 751, 517 S.E.2d 853, 860 (1999), *cert. denied*, 528 U.S. 1124, 120 S. Ct. 951, 145 L. Ed. 2d 826 (2000). Our Supreme Court, however, has held that the trial court did not abuse its discretion by consolidating charges of murder for trial where the victims were killed within *two months* of each other. *State v. Chapman*, 342 N.C. 330, 343, 464 S.E.2d 661, 668 (1995), *cert. denied*, 518 U.S. 1023, 116 S. Ct. 2560, 135 L. Ed. 2d 1077 (1996). In the case *sub*

judice, the offenses were essentially committed only weeks apart when we consider the amount of time in which defendant was incarcerated between the two cases. From the date that defendant was arrested for the 22 December 1999 offenses against Ms. Sykes, he was out of jail for less than three weeks before he committed the 17 August 2000 offenses against Ms. Maynard. Thus, this short interval of time between the offenses in which defendant was at large with the opportunity to commit the offenses falls well within the varying time periods our courts have held to support joinder of offenses.

Thus, we conclude that the court did not abuse its discretion when it found a transactional connection.

Whether defendant was prejudiced

Upon determining that a transactional connection exists, a question remains as to whether the defendant was prejudiced by the joinder such that he could not present a defense and was thus deprived of a fair trial. In comparing the State's evidence from the two cases, we have established that the time, place, and circumstances of the offenses are not so distinct as to render consolidation unjust and prejudicial to defendant. Certainly, permitting joinder presented a more difficult task for defendant to defend himself against the offenses he committed against Ms. Sykes, since the jury heard DNA and hair evidence from the Maynard case. Defendant argues that this evidence would not have been admitted against him if he had been tried separately for the Sykes case. However, unless the trial court determined that its "probative

value [was] substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury" under North Carolina Rules of Evidence, Rule 403, then the DNA and hair evidence would likely be admitted under Rule 404(b), which states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2001). As was the case in *State v. Chandler*, defendant's "contention has no merit because if the cases were tried separately the State could still have presented evidence of other similar sex crimes [in the Maynard case] as evidence of a common scheme or plan [in the Sykes case]." *State v. Chandler*, 324 N.C. 172, 188, 376 S.E.2d 728, 738 (1989) (citing N.C.G.S. 8C-1, Rule 404 (b) (2001)). More recently, our Supreme Court stated in *State v. Williams*, "[T]he similarities in these cases were such that the essential evidence in one case would have been admissible in every other case to prove intent, plan, or design." *Williams* at 531, 565 S.E.2d at 627 (citations omitted). In *Williams*, the defendant was convicted of various rapes, assaults and murders "involving seven different victims over a . . . fifteen- to sixteen-month span, with the longest time between offenses being close to five months." *Id.* at 529-31, 565 S.E.2d at 626-27. In deciding that joinder of all the offenses was proper, the *Williams* court stated, "The evidence disclosed a similar *modus operandi*, similar circumstances with respect to the type of

victims, similar location, and a DNA match between defendant and several of the victims." *Id.* at 531, 565 S.E.2d at 627. We find the case before us to be similar to *Williams* in such respects. Thus, we overrule defendant's assignment of error as to the joinder issue and find that the trial court acted within its discretion.

Defendant's final assignments of error

Defendant next contends that the trial judge erred when he expressed an improper opinion and prejudicially misstated the law during jury selection. We disagree.

During jury selection, defense counsel asked a prospective juror, "Do you understand that juries do not find people innocent?" The prospective juror hesitated to answer definitively and the trial judge stated the following:

> The State has the burden of proof to prove guilt beyond a reasonable doubt and the options are either guilty or not guilty. There's no such term of law as innocence. So if anybody is thinking innocence up there, that's not a term of law. You will make a determination based upon the charge I give you as to the law, and as to guilt beyond a reasonable doubt or not guilty.
>
> Innocence is not a factor in the law as far as a term of law that's used that you'll hear during the course of this trial. You'll hear guilty or not guilty. And you'll hear the burden on the State and other legal principles that is [sic] involved. You'll not hear the word innocence because it is not a legal principle. Everybody understand that? All right.

We do not find that this statement prejudiced defendant in any manner. Additionally, defense counsel, in his closing argument stated:

> Now ladies and gentlemen, you can't prove you're innocent. Our whole justice system revolves around the concept you can't prove that you're innocent. And to that we say you don't have to prove you're innocent.

Defendant acknowledged the same principle in his closing argument as did the trial judge during jury selection. We find this assignment of error to be without merit.

Finally, defendant argues that the trial court lacked jurisdiction due to the use of a short-form indictment. Since defendant acknowledges that this Court has held North Carolina short-form indictments for first-degree rape and first-degree sexual offense to be constitutional and only submits this claim in order to exhaust and preserve this issue for federal review, we note that he has done so, but we overrule this assignment of error.

No error.

Judges TIMMONS-GOODSON and HUDSON concur.

Report per Rule 30(e).