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NO. COA05-1665

NORTH CAROLINA COURT OF APPEALS

Filed: 2 January 2007

STATE OF NORTH CAROLINA

v. Union County
No. 02 CRS 051779, 02 CRS
MARCUS DEON STREATER, 51380, 02 CRS 051381, 02 CRS
Defendant. 051383, 02 CRS 051384, 02 CRS
051389, 02 CRS 051392

Appeal by Defendant from judgment entered 18 May 2004 by Judge Michael E. Beale in Superior Court, Union County. Heard in the Court of Appeals 10 October 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Jonathan P. Babb, for the State.

Attorney Glover & Petersen, P.A., by James R. Glover for defendant-appellant.

WYNN, Judge.

"[O]ffenses that are committed on separate dates cannot be joined for trial, even when they are of like character, unless the circumstances of each offense are so distinctly similar that they serve almost as a fingerprint."¹ Here, the trial court joined three robbery offenses separated by thirty-five days between the first and second offense and committed at different times of day.

¹ *State v. Williams*, 74 N.C. App. 695, 697, 329 S.E.2d 705, 707 (1985).

We hold that any error by the trial court in joining the offenses was harmless.

On 25 January 2002, Brandon Anderson and David Byrd worked at a Subway restaurant in the Hilltop Plaza in Monroe, North Carolina. Around 9:00 p.m., four men entered the building carrying a handgun and a shotgun. The men demanded that the safe be opened, but neither Anderson nor Byrd had the code. One robber then opened the cash register and took approximately \$52.00. The robbers took the contents of Anderson's wallet and locked Anderson and Byrd in the freezer. Afterwards, Anderson and Byrd called 9-1-1 from a cell phone.

During the robbery, three of the four robbers wore ski masks; Byrd identified the man without the mask as Calbert Luckey. At trial, Luckey identified the other robbers as Thomas Grant Cousin, Terie Smith, and Defendant Marcus Streater.

On 1 March 2002, Chris Salinas Vanderhost worked at the front desk at the Hilltop Motel in Monroe, North Carolina. About 10:20 a.m., a man armed with a pistol and wearing a mask entered and demanded money. Vanderhost took out the cash drawer and placed it on the counter. The robber took the money from the cash drawer and put it in his pockets. The robber then asked for the safe, but Vanderhost told him the inn did not have one. The robber ran out the back door.

That same day at approximately 11:00 p.m., Sergeant Davey Plyer of the Monroe Police Department was dispatched to the Village Square Apartments in Monroe, North Carolina. When he arrived, he

found Alejandro Cruz lying partially in the bushes. Cruz had been shot in the hip, and was taken to the hospital. Sergeant Plyer recovered a .25 caliber shell casing on the sidewalk and a spent .25 caliber bullet near the front door of an apartment.

On the night of 4 March 2002, Perrie Middleton and Tim Mojzik worked at Wendy's restaurant in Marshville, North Carolina. About 1:30 a.m. Middleton left, leaving Mojzik alone. At 6:30 a.m. the next morning, General Manager Kathy Sherman found Mojzik slumped over a desk. According to the North Carolina Medical Examiner's report Mojzik died as a result of a single gun shot wound that passed through his aorta and lodged in his back. A spent .25 caliber shell casing was found on the floor just outside the office.

An SBI ballistics examiner opined that the .25 caliber bullet found at the Village Square Apartments and the bullet taken from Mojzik as well as the shell casings collected at each crime scene were fired from the same .25 caliber semi-automatic pistol.

As a result of information from a confidential informant and further police investigation, a magistrate issued an arrest warrant for Thomas Grant Cousin. Police officers also looked for Defendant Marcus Streater as well as a brown or gold Nissan Maxima that he and Cousin reportedly rode around in and had been used after the shooting on 1 March 2002.

At a gas station, police officers found Cousin and Michael Todd McClain in a brown Nissan Maxima and Anthony Hammond pumping gas. The officers informed Cousins he was under arrest and told

him to get out of the vehicle. As Cousins exited the vehicle, several rounds of rifle ammunition fell out of his right pant leg. Inside the Maxima, the officers found twelve gauge shotgun shells, a roll of duct tape, a ski mask, a pair of black gloves and a dark heavy jacket.

As police officers placed Cousins under arrest, Defendant walked out of the gas station convenience store. An officer asked Defendant if the car belonged to him. Defendant said that it did. An officer asked Defendant where the guns for the ammunition were, and Defendant stated they were in the trunk. The officer asked if he could search Defendant's trunk and Defendant said to go ahead. In the trunk, officers found a 7.62 mm rifle, a twelve gauge shotgun with a sawed off barrel measuring less than eighteen inches. Defendant was arrested for possession of a shotgun with a barrel of less than eighteen inches, a weapon of mass destruction.

During interrogation by police, Defendant confessed to participating in the robbery of the Subway restaurant and being the 'wheelman' during the robbery of the Hilltop Inn, the shooting of Alejandro Cruz, and the shooting of Tim Mojzik.

At trial, Defendant was found guilty of first-degree murder, felony conspiracy to commit robbery with a dangerous weapon, three counts of robbery with a dangerous weapon, and two counts of second degree kidnapping. From these convictions, Defendant appeals arguing that trial court erred by (I) joining for a single trial charges arising out of three disparate transactions and (II)

requiring that Defendant surrender his right to silence at the suppression hearing.

I.

Regarding Defendant's first argument, North Carolina General Statutes (2005) Section 15A-926(a) permits a trial court to join two or more offenses 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."

On appeal, we review a trial court's ruling on a joinder motion under the abuse of discretion standard. *State v. Neal*, 76 N.C. App. 518, 520, 333 S.E.2d 538, 539 (1985). To show an abuse of discretion by the trial court, a defendant must show that the ruling was so arbitrary it could not have been the result of a reasoned decision. See *State v. Campbell*, 359 N.C. 644, 673, 617 S.E.2d 1, 19 (2005). The determination of "[w]hether an abuse of discretion occurred must be determined as of the time of the order of consolidation" *Neal*, 76 N.C. App. 518, 520, 333 S.E.2d 538, 540 (1985).

Despite our adherence to an abuse of discretion standard of review on the joinder of offenses for one trial, the determination that a transactional "connection exists so that the offenses may be joined for trial is a fully reviewable question of law." *State v. Williams*, 355 N.C. 501, 529, 565 S.E.2d 609, 626 (2002). In considering whether a 'transactional connection' exists, we

consider such factors as the nature of the offenses charged, commonality of facts, the lapse of time between offenses, the unique circumstances of each case as well as similarities in victims, location, time, motive, and modus operandi. *E.g.*, *State v. Bracey*, 303 N.C. 112, 277 S.E.2d 390 (1981); *State v. Herring*, 74 N.C. App. 269, 273, 328 S.E.2d 23, 26 (1985). Where there is no transactional connection between charges joined for trial, joinder is improper as a matter of law. See *State v. Silva*, 304 N.C. 122, 126 282 S.E.2d 449, 452 (1981) (citation omitted).

Here, the charges joined for trial arose from three separate offenses -- the first on 25 January 2002 at the Subway restaurant in Monroe, North Carolina, the second on 1 March 2002 at the Hilltop Inn also in Monroe, and the third on 5 March 2002 at the Wendy's restaurant in Marshville, North Carolina. In the trial court's order to join offenses for trial, the trial court noted the incident at the Subway restaurant occurred at approximately 9:15 p.m., the incident at the Hilltop Inn at approximately 10:20 a.m., and the incident at the Wendy's restaurant at approximately 1:30 a.m. The Subway restaurant and the Hilltop Inn were located within several hundred yards of each other while the Wendy's restaurant was located approximately eight miles away. The motive in each case was apparently robbery. In each case the robbers surprised their victims, wore masks, gloves, carried a gun, and attempted to open or asked about a safe. The trial court also noted that in each incident Defendant Streater was involved.

In absence of a charge that acts as an umbrella, "offenses that are committed on separate dates cannot be joined for trial, even when they are of like character, unless the circumstances of each offense are so distinctly similar that they serve almost as a fingerprint." *State v. Williams*, 74 N.C. App. 695, 697, 329 S.E.2d 705, 707 (1985). Here, the execution of these offenses took place on three different dates, 25 March 2002, 1 March 2002, and 5 March 2002; at various times during the day, 10:20 a.m., 9:20 p.m., and 1:30 a.m.; and in two different towns, Monroe and Marshville, North Carolina. The *modus operandi* of the robbers could only generally be described as they surprised their victims, wore masks, gloves, used a handgun and attempted to open the business safe. In addition, the offenses were separated by a substantial gap in time: thirty-five days elapsed between the first and second incidents. Compare *Herring*, 74 N.C. App. 269, 328 S.E.2d 23 (1985) (forty days between factually similar offenses was a substantial time and rendered the offenses too distinct for joinder). Considering the substantial temporal gap between the first and second offense, the inconsistency in regard to the times of day in which the offenses were carried out, and the general description of the robber's outfits and gun, we find these facts do not amount to circumstances so distinctly similar that a transactional connection can reasonably be established between them.

Nonetheless, though joinder was improper, it does not automatically follow that it was prejudicial. Under North Carolina Rule of Evidence 404(b) evidence of other crimes may be admissible

for proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. Here, evidence from any two of the offenses joined would be admissible in the trial for the remaining offense to show intent or knowledge; therefore, the trial court's joinder of charges for trial was not prejudicial to Defendant. Accordingly, we hold the joinder of charges for trial was harmless error.

II.

Next, Defendant argues that the trial court deprived Defendant of his due process right to a meaningful hearing by improperly requiring that Defendant surrender his right to silence in order to offer testimony in support of motions to suppress. We disagree.

In *U.S. v. Simmons*, 390 U.S. 377, 88 S. Ct. 967 (1968) the United States Supreme Court held that where a defendant surrendered his constitutional right to remain silent in order to testify in a suppression hearing on an alleged violation of the defendant's constitutional fourth amendment right against an unreasonable search and seizure, the State could not at trial use the defendant's testimony against him. In *Simmons*, the defendant sought to suppress the admission of a suitcase as fruit of an illegal search, but at the suppression hearing first had to establish his standing to contest the suitcase seizure. *Id.* Since the residence in which the suitcase was found did not belong to the defendant, the Court noted that a connection between the defendant and the suitcase may have been difficult for the State to prove at trial if the defendant did not incriminate himself, and at the

suppression hearing, the most natural way for the defendant to substantiate his standing was to claim ownership of the suitcase. *Id.* The defendant established standing, but was unsuccessful in suppressing the admission of the suitcase. *Id.* At trial, the prosecution used the defendant's suppression hearing testimony claiming ownership of the suitcase as evidence of the defendant's guilt. *Id.*

The United States Supreme Court considered the deterrent affect of admissibility of testimony from a suppression hearing at trial on a defendant's decision to bring a claim of suppression based on a constitutional right. The Court reasoned that "[i]n such circumstances, a defendant with a substantial claim for the exclusion of evidence may conclude that the admission of the evidence, together with the Government's proof linking it to him, is preferable to risking the admission of his own testimony connecting himself with the seized evidence." *Id.* at 393, 88 S. Ct. 976. The United States Supreme Court concluded that in such a scenario, the surrender of one constitutional right for the assertion of another was an intolerable compromise. *Id.* As such, the Court held that "when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection." *Id.* at 394, 88 S. Ct. 976.

Here, based on Defendant's motion and affidavit, the trial court conducted a suppression hearing for evidence received as a

result of a search of Defendant's car and a statement made by Defendant to police. At the hearing, the only witnesses to testify were a North Carolina State Bureau of Investigation Officer and a detective with the Marshville Police Department. Both witnesses testified for the State. After the close of the State's evidence, the trial court instructed Defendant the defense had put forth no evidence and that if Defendant wanted to personally put on evidence, Defendant must be sworn and testify. At which point, Defendant moved to withdraw his affidavit. Defendant through counsel stated that he withdrew his affidavit to avoid cross examination from the State. Only after that did the trial court instruct Defendant that if he chose to testify he would be subject to cross examination by the State and anything he said might and could be used against him in the trial of the case. Defendant informed the trial court that he had consulted with his attorney, he understood his rights and then again declined to testify.

Thus, the facts of this case are distinctive from those in *Simmons*; indeed, on the facts before us, we find instructive *State v. Bracey*, 303 N.C. 112, 277 S.E.2d 390 (1981). There, our Supreme Court interpreted the holding of *Simmons* in the context of the use of a defendant's testimony for impeachment purposes. The Court stated that the defendant's "testimony from an unsuccessful suppression hearing was not introduced as evidence in the State's case in chief. Instead, defendant was questioned on cross-examination about his bad or illegal acts including the use of the illegal drug, PCP. This impeachment use, as opposed to using it to

establish guilt, is permissible under *Simmons*." *Id.* at 120, 277 S.E. 2d at 396.

Likewise in this case, if Defendant had testified, the evidence adduced from his statements at the suppression hearing could not have been used to establish his guilt but it may have been admissible for other purposes, such as impeachment. Thus, while it would have been error for the trial court to allow Defendant's statements at the suppression hearing to establish his guilt, we construe the statement of the trial court in this case to mean that Defendant's statements at the suppression hearing would have been admissible for purposes other than to establish his guilt. We note further that Defendant had prior to the trial court's statement communicated his decision not to testify. Accordingly, we hold the trial court's instruction that Defendant's testimony given during a suppression hearing was consistent with the law that such statements could be used against defendant for purposes other than to establish his guilt.

No prejudicial error.

Judges MCGEE and MCCULLOUGH concur.

Report per rule 30(e).