NO. COA07-1096

NORTH CAROLINA COURT OF APPEALS

Filed: 20 May 2008

STATE OF NORTH CAROLINA

v. Cumberland County
Nos. 03 CRS 70932-36, 70938, 70914

MICHAEL ORLANDO COOK

Appeal by Defendant from judgments dated 13 February 2007 by Judge Thomas H. Lock in Superior Court, Cumberland County. Heard in the Court of Appeals 5 March 2008.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Reita Pendry for Defendant-Appellant.

McGEE, Judge.

Michael Orlando Cook (Defendant) was found guilty of first-degree kidnapping, five counts of second-degree kidnapping, five counts of robbery with a dangerous weapon, assault with a deadly weapon with intent to kill inflicting serious injury, felony speeding to elude arrest, and resisting, delaying, or obstructing a public officer. The trial court arrested judgment on the charge of resisting, delaying, or obstructing a public officer and sentenced Defendant on the remaining charges. Defendant appeals.

The State filed a motion on 13 January 2005 to join all charges for trial. Defendant filed an "objection to joinder and

motion of severance" dated 31 January 2005. The trial court ordered that all charges be joined for trial.

At trial, Richard Norwood (Mr. Norwood) testified that shortly before 8:00 a.m. on 14 December 2003, he went outside his house to smoke a cigarette and get the newspaper. While Mr. Norwood was outside, he saw a green Isuzu SUV drive by, and he made eye contact with the passenger. As Mr. Norwood was walking back toward his house, a black male, whom Mr. Norwood identified as Defendant, came around the corner of Mr. Norwood's house and pointed a gun at him. Mr. Norwood testified that he also recognized Defendant as the man he had seen in the green Isuzu SUV, and with whom he had made eye contact.

Mr. Norwood testified that Defendant said, "I want your money. Get in the house." Defendant continued to point the gun at Mr. Norwood and followed him into the house. Defendant told Mr. Norwood to get his wallet, keys, and cell phone, and Mr. Norwood gave those items to Defendant. Defendant then told Mr. Norwood and Mr. Norwood's wife, who was also in the house, to get into the bathroom and to stay there or he would shoot them. Mr. Norwood waited for several minutes and then left the bathroom. By then, Defendant had left the house and Mr. Norwood called police.

Tyrell Rembert (Mr. Rembert) testified that on 14 December 2003, he lived next door to Mr. Norwood. Mr. Rembert testified that shortly before 8:00 a.m. on 14 December 2003, he went outside to get the newspaper and saw a green Isuzu Rodeo backing down the street very fast. He testified that he noticed the vehicle because

its "tires skid[ded]" and it was being driven erratically. Mr. Rembert also testified that he prepared a written statement for police that contained "the same stuff that [the officer] noted in his report[.]"

Jay Leach (Mr. Leach) testified that between 6:30 a.m. and 7:00 a.m. on 15 December 2003, he and his wife walked out of their house on the way to their vehicle. Mr. Leach testified that he and his wife were confronted by two black men, each of whom had a gun. Mr. Leach identified Defendant as the man who told Mr. Leach and his wife, "We're going to rob you," and who told them to go inside their house. Once inside the house, Defendant asked for money or jewelry and Mr. Leach gave Defendant a jar containing two checks and $73.00 in cash. Defendant and the other man continued to point their guns at Mr. Leach and his wife. Defendant then told Mr. Leach and his wife to get into the bathroom and stay there or he would shoot them. Mr. Leach and his wife remained in the bathroom for several minutes and then came out and called 911. By this time, Defendant and the other man had left the house.

Barbara Kelly (Ms. Kelly) testified that she returned home from work around 2:25 a.m. on 17 December 2003, and parked her vehicle in front of her townhouse. When Ms. Kelly got out of her vehicle, she saw Defendant standing at the back of her vehicle with a gun pointed at her. Defendant said, "I need money." Ms. Kelly gave him $2.00 that she had in the pocket of her pants. Defendant also took Ms. Kelly's purse and cell phone. Ms. Kelly further testified that Defendant said,

> "Now, open the door and stick the key back in the ignition." So, I opened the door and [stuck] the key back in the ignition. [Defendant] said, "Now crank it up," and I cranked the [vehicle] up. [Defendant] said, "Get out and close the door," so I closed the door.

Defendant asked Ms. Kelly for more money and she told him that she did not have any more, but that he could have all of the DVDs, CDs and TVs inside her house. Defendant then told Ms. Kelly to go to the door of her house. Ms. Kelly walked toward the door with Defendant walking behind her. With her keys still in the ignition of her vehicle, Ms. Kelly had to knock on the door and ring the door bell continuously. While Ms. Kelly stood at the door knocking, Defendant continued to stand behind her with a gun. When Ms. Kelly's husband opened the door, Ms. Kelly stepped inside, turned around, and heard a gunshot. Ms. Kelly's husband fell to the floor and Ms. Kelly saw Defendant run away from the door. Ms. Kelly closed the door, locked it, and then called 911.

Detective Danielle Genest-Hart (Detective Genest-Hart) testified that all these crimes occurred in the Cliffdale Road area of Fayetteville. Detective Genest-Hart also testified that "Mr. Norwood and Mr. Norwood's neighbor, Mr. Rembert, had stated they had seen a green SUV Isuzu type vehicle believed to be an Isuzu [R]odeo. That was something that we could investigate and look into." She further testified that she and another officer were on patrol in the Cliffdale Road area in the early hours of 17 December 2003. Detective Genest-Hart testified that she saw a black male driving toward her vehicle in a green Isuzu Rodeo. Detective

Genest-Hart made a u-turn, got behind the green Isuzu Rodeo, and activated the blue lights in an attempt to stop the vehicle and talk with the driver. The green Isuzu Rodeo slowed down but did not stop. Eventually, the green Isuzu Rodeo stopped and Detective Genest-Hart and the other officer got out of their vehicle and walked toward the green Isuzu Rodeo. When Detective Genest-Hart reached the bumper of the green Isuzu Rodeo, the driver turned around, looked at her, and then sped off. The officers returned to their vehicle and began to follow the green Isuzu Rodeo. The driver of the green Isuzu Rodeo drove carelessly and recklessly and continued to flee from police at speeds of more than fifteen miles per hour over the posted speed limit. The green Isuzu Rodeo then turned onto a dead-end road where it stopped. The driver jumped out and began to run away on foot. Detective Genest-Hart testified that the other officer chased the driver and eventually caught him. Detective Genest-Hart identified Defendant as the black male who fled in the green Isuzu Rodeo and who later ran from police.

I.

Defendant first argues the trial court erred by joining the offenses for trial. N.C. Gen. Stat. § 15A-926(a) (2007) provides that joinder is appropriate where "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."

"[A] two-step analysis is required for all joinder inquiries." *State v. Montford*, 137 N.C. App. 495, 498, 529 S.E.2d 247, 250,

cert. denied, 353 N.C. 275, 546 S.E.2d 386 (2000). First, the trial court must determine whether a sufficient transactional connection exists between the criminal offenses. *Id.* Second, where an adequate transactional connection exists, the trial court must consider whether joinder undermines the defendant's right to a fair hearing on each charge and whether the joinder hinders the defendant's ability to present a defense. *Id.* While the first question of whether an adequate connection exists is fully reviewable on appeal, the latter question is within the sound discretion of the trial court and will not be disturbed absent a manifest abuse of discretion. *Id.* Reversible error occurs only where "'the charges are "so separate in time and place and so distinct in circumstances as to render the consolidation unjust and prejudicial to [the] defendant."'" *State v. Beckham*, 145 N.C. App. 119, 126, 550 S.E.2d 231, 237 (2001) (citations omitted).

In the present case, all the crimes occurred over a four-day period and in the same area near Cliffdale Road. Defendant was identified as the perpetrator of all of the crimes, and he used a similar *modus operandi* in each. Defendant used a gun to rob the victims in each incident and forced, or attempted to force, the victims into their houses. We hold that the charges were based on a series of acts that were sufficiently connected to warrant joinder for trial. *See State v. Simpson*, 159 N.C. App. 435, 437, 583 S.E.2d 714, 715, *aff'd per curiam*, 357 N.C. 652, 588 S.E.2d 466 (2003) (holding that "a transactional connection was evidenced by a common modus operandi, the short time lapse between the criminal

activity, and similar circumstances in victim, location, and motive").

Regarding the offense arising out of Defendant's flight from police on 17 December 2003, our Court held in *State v. Byrd*, 50 N.C. App. 736, 275 S.E.2d 522, *disc. review denied*, 303 N.C. 316, 281 S.E.2d 654 (1981), that

> [the] defendant, who was fleeing from the scene of one of the other crimes with which he was charged and who assaulted an officer attempting to apprehend, detain, or arrest him while in such flight, was engaged in a series of acts or transactions connected together within the meaning of G.S. 15A-926(a).

Id. at 739-40, 275 S.E.2d at 525. Our Court further held that "[u]nder these circumstances, the offenses were not so separate in time or place or so distinct in circumstances as to render a consolidation unjust or prejudicial to [the] defendant." *Id.* at 740, 275 S.E.2d at 525. Likewise, in the present case, Defendant fled from the area where the crimes occurred on the same day of the incident involving Ms. Kelly. Therefore, as in *Byrd*, Defendant in the case before us was engaged in a "series of acts or transactions connected together within the meaning of G.S. 15A-926(a)." *See id.* at 739-40, 275 S.E.2d at 525. We also hold that Defendant has not demonstrated that joinder undermined his right to a fair hearing or his ability to present a defense. Under the circumstances described above, the offenses in the present case "were not so separate in time or place or so distinct in circumstances as to render a consolidation unjust or prejudicial to [D]efendant." *See id.* at 740, 275 S.E.2d at 525. We overrule this assignment of

error.

II.

Defendant next argues the trial court abused its discretion by failing to strike Mr. Rembert's testimony because the State failed to provide the defense with a written statement that Mr. Rembert gave to police immediately following the incident at Mr. Norwood's house. The State has an obligation to make available to a defendant all witness statements. N.C. Gen. Stat. § 15A-903(a)(1) (2007). However, N.C. Gen. Stat. § 15A-910(a) (2007) provides:

> If at any time during the course of the proceedings the court determines that a party has failed to comply with this Article or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers may
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> (1) Order the party to permit the discovery or inspection, or
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> (2) Grant a continuance or recess, or
>
> (3) Prohibit the party from introducing evidence not disclosed, or
>
> (3a) Declare a mistrial, or
>
> (3b) Dismiss the charge, with or without prejudice, or
>
> (4) Enter other appropriate orders.

"Whether a party has complied with discovery and what sanctions, if any, should be imposed are questions addressed to the sound discretion of the trial court." *State v. Tucker*, 329 N.C. 709, 716, 407 S.E.2d 805, 810 (1991).

In *State v. Fernandez*, 346 N.C. 1, 484 S.E.2d 350 (1997), our Supreme Court held that the defendant was not prejudiced by the

failure of the State to provide a witness' written statement. *Id.* at 17-18, 484 S.E.2d at 360-61. The State had "diligently and repeatedly" attempted to locate the written statement, but could not provide it to the defendant because it was lost. *Id.* at 17, 484 S.E.2d at 360. Our Supreme Court recognized that the purpose of obtaining the statement would have been to identify any of the witness' prior inconsistent statements. *Id.* However, our Supreme Court held that

> notes taken by [an officer] on the morning of the crimes show that [the witness] made statements consistent with her testimony shortly after her discovery of the crime scene. [The] [d]efendant could not have shown that [the witness] made a prior inconsistent statement, and therefore [the defendant] was not prejudiced by the loss of [the witness'] statement.

Id. at 17-18, 484 S.E.2d at 360-61.

In the present case, the trial court directed the State to locate Mr. Rembert's statement and to provide it to Defendant. The State attempted to locate any such statement but informed the trial court that, based upon the practice of the police department at the time, Mr. Rembert's statement had been discarded after police incorporated its substance into a report. However, as in *Fernandez*, Defendant was not prejudiced by the failure of the State to provide this statement. Mr. Rembert testified that the written statement provided to police contained "the same stuff that [the officer] noted in his report[.]"

Defendant also argues that Mr. Rembert "was the only witness who identified the car leaving the scene as being the car in which

[D]efendant . . . was arrested. As such, [Mr. Rembert] was central to the State's prosecution of the Norwood incident." We disagree. Contrary to Defendant's assertion, Mr. Norwood identified the vehicle in which Defendant was a passenger as a green Isuzu SUV. Therefore, Mr. Rembert was not the only witness to identify the vehicle involved in the incident. Moreover, Mr. Rembert's testimony was tangential in that he only saw the green Isuzu Rodeo and did not see Defendant.

Defendant also asserts a constitutional violation. However, because Defendant did not raise this argument before the trial court, this argument is waived. *See Fernandez*, 346 N.C. at 18, 484 S.E.2d at 361 (stating: "As to [the] [d]efendant's assertions of constitutional error, such arguments were not raised at trial and are thereby waived on appeal.").

III.

Defendant also argues the trial court erred by instructing the jury that it could find Defendant guilty of kidnapping if it found, *inter alia*, that Defendant restrained, confined, or removed Ms. Kelly because there was insufficient evidence that Defendant confined Ms. Kelly. Specifically, Defendant argues that Ms. Kelly "was not held by the gunman in the car, or in any other confined space." We disagree.

Defendant did not object to this instruction and does not assert plain error. Therefore, the State contends that this issue is not preserved. Generally, a defendant's failure to object to an alleged error of the trial court precludes the defendant from

raising the error on appeal. *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). "Where, however, the error violates [a] defendant's right to a trial by a jury of twelve, [a] defendant's failure to object is not fatal to his right to raise the question on appeal." *Id.*; *see also State v. Brewer*, 171 N.C. App. 686, 691, 615 S.E.2d 360, 363 (2005) (quoting *State v. Wiggins*, 161 N.C. App. 583, 592, 589 S.E.2d 402, 409 (2003), *disc. review denied*, 358 N.C. 241, 594 S.E.2d 34 (2004)), *disc. review denied*, 360 N.C. 484, 632 S.E.2d 493 (2006) (stating that "'[v]iolations of constitutional rights, such as the right to a unanimous verdict . . . are not waived by the failure to object at trial and may be raised for the first time on appeal.'"). Accordingly, we may review this issue. *See State v. Johnson*, ___ N.C. App. ___, ___, 646 S.E.2d 123, 127-28 (2007).

In *State v. Fulcher*, 294 N.C. 503, 243 S.E.2d 338 (1978), our Supreme Court recognized that "the term 'confine' connotes some form of imprisonment within a given area, such as a room, a house or a vehicle." *Id.* at 523, 243 S.E.2d at 351. Ms. Kelly testified that Defendant told her to stick the key into the ignition of her vehicle and to start the vehicle. Ms. Kelly complied when she reached into the vehicle, started the vehicle, and then got out and closed the door. Because Defendant forced Ms. Kelly to reach into the vehicle and start it, Defendant confined Ms. Kelly within her vehicle. *See id.* Defendant also confined Ms. Kelly at gunpoint within the area in front of her residence while she knocked on the door. *See id.* Accordingly, we hold there was sufficient evidence

that Defendant confined Ms. Kelly, and the trial court did not err in its instructions to the jury.

No error.

Judges TYSON and STEPHENS concur.

Report per Rule 30(e).