NO. COA08-488

NORTH CAROLINA COURT OF APPEALS

Filed: 4 November 2008

STATE OF NORTH CAROLINA

v. Guilford County
Nos. 06 CRS 089165-089166
LEWIS JERMAINE CHAPMAN 06 CRS 089168

Appeal by defendant from judgments entered 20 September 2007 by Judge Lindsay R. Davis, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 31 October 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Daniel L. Addison, for the State.

Cheshire, Parker, Schneider, Bryan & Vitale, by John Keating Wiles, for defendant-appellant.

TYSON, Judge.

Lewis Jermaine Chapman ("defendant") appeals from judgment entered after a jury found him to be guilty of three counts of robbery with a dangerous weapon pursuant to N.C. Gen. Stat. § 14-87. We find no error.

I. Background

Defendant and two others were involved in the robberies of three Greensboro convenience stores, Red's Curb Market on 21 July 2006, Jay's Grocery on 23 July 2006, and the Quick Buy on 27 July 2006. At trial, the following individuals testified: (1) co-defendant Latron Johnson ("Latron"), who had previously pled

guilty; (2) Bobby Lovelace ("Lovelace"), the manager at Red's Curb Market who was working during the 21 July 2006 robbery; (3) Pritish Patel ("Patel"), the cashier at Jay's Grocery Store who was working during the 23 July 2006 robbery; (4) Norma Crawford ("Crawford"), the cashier at the Quick Buy who was working during the 27 July 2006 robbery; and (5) Anthony Taylor ("Taylor"), a witness to the Quick Buy robbery. Several law enforcement officers also testified regarding the investigation of the three crimes. The 21 and 27 July 2006 robberies were captured by video surveillance. Two videos, as well as some still photographs taken from each, were also admitted into evidence.

Latron testified that he and defendant planned to rob a convenience store along with defendant's cousin, Antonio Johnson ("Antonio"). On 21 July 2006, defendant and Antonio picked up Latron in defendant's black Honda and drove to Red's Curb Market. Defendant and Latron entered the store, while Antonio waited in the parking lot of a nearby apartment complex. Defendant and Latron were wearing t-shirts, jeans, and baseball caps. After they entered the store, defendant brought some items to the cash register, as if he was going to purchase them. As Lovelace opened the cash register, Latron pulled out a 12-gauge sawed-off shotgun. Latron pointed the gun at the cashier, and the two robbers demanded the money in the drawer. Defendant took the money from Lovelace, and both returned to the car where Antonio was waiting.

Following the 21 July 2006 robbery, defendant, Latron, and Antonio discussed the two additional robberies. The three carried

out the 23 July 2006 robbery of Jay's Grocery and the 27 July 2006 robbery of the Quick Buy in the same manner as the first robbery: Antonio waited in the black Honda, while defendant and Latron went inside the convenience store; defendant and Latron wore the same type of clothing as in the first robbery; one of the robbers pretended to buy an item; the other robber pulled out Latron's gun as the cashier opened the drawer; they demanded and received money, and left the store. Patel was the only witness to the robbery at Jay's Grocery. However, Crawford was not the only witness to the Quick Buy robbery. Taylor entered the store while the robbery was in progress. After the robbery, customers outside gave Taylor the black Honda's license plate number. After each robbery, defendant, Latron, and Antonio divided the money equally among themselves.

Defendant was indicted on three counts of robbery with a dangerous weapon for the offenses occurring on 21, 23, and 27 July 2006. The State filed a pretrial motion to join the three cases for trial, which the trial court granted on 17 September 2006. Following the conclusion of the State's evidence, defendant moved to dismiss all charges. Defendant did not present any evidence and renewed his motion to dismiss, which the trial court denied.

During deliberations, the jury asked to review the surveillance video of the 21 July 2006 robbery, the surveillance video of the 27 July 2006 robbery, and a still photograph taken from the 21 July 2006 recording. Over defendant's objection, the trial court permitted the jury to review the three exhibits in the courtroom.

On 19 September 2007, approximately one hour after reviewing the exhibits, the jury convicted defendant on all counts. The trial court entered judgment and sentenced defendant to three consecutive terms of a minimum of 105 to a maximum of 135 months active imprisonment, for an aggregate of 315 to 405 months. Defendant appeals.

II. Issues

Defendant argues the trial court erred by: (1) joining the three offenses together in one trial and (2) permitting the jury to review exhibits during deliberations.

III. Joinder of Offenses

Defendant argues the trial court erred by joining the three counts of robbery with a dangerous weapon together in one trial.

N.C. Gen. Stat. § 15A-926(a) (2007) permits a trial court to join one or more offenses together for trial where 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. If two or more offenses have a transactional connection, the decision to join for trial is "left to the 'sound discretion of the trial judge and that ruling will not be disturbed on appeal absent an abuse of discretion.'" *State v. Weathers*, 339 N.C. 441, 447, 451 S.E.2d 266, 269 (1994) (quoting *State v. Silva*, 304 N.C. 122, 126, 282 S.E.2d 449, 452 (1981)).

If a transactional connection exists, we must determine whether joinder of the offenses prejudiced defendant by hindering his ability to present a defense or by depriving him of a fair

trial. *State v. Hyatt*, 355 N.C. 642, 658-59, 566 S.E.2d 61, 72 (2002) (citing *State v. Greene*, 294 N.C. 418, 421-22, 241 S.E.2d 662, 664 (1978)), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003).

Defendant contends that the three offenses were separate, distinct, and not part of a single plan. Defendant asserts the crimes involved three different dates, locations, and victims. Defendant also argues the jury would have been less likely to convict defendant for the 21 and 23 July 2006 offenses if they had been tried separately. Defendant states the only testimony linking defendant to these offenses was the "interested testimony" of co-defendant Latron. Crawford and Taylor were the only eyewitnesses who identified defendant during the trial, and their testimony prejudiced the jury's decision to convict defendant of the other two weaker offenses.

We find defendant's first argument unpersuasive. Our Supreme Court has previously held that joinder was proper in a case involving facts similar to those in the instant case. *See State v. Bracey*, 303 N.C. 112, 277 S.E.2d 390 (1981). In *Bracey*, the Supreme Court held that a transactional connection may be supported by a trial court's determination that multiple cases have "common issues of fact." 303 N.C. at 117, 277 S.E.2d at 394. The Court pointed out that "[i]t is crucial to note the trial judge's ruling was based on commonality of facts and not just on a commonality of crimes." *Id.* In *Bracey*, the following evidence was sufficient to support a commonality of facts:

> The evidence in the three cases shows a similar modus operandi and similar circumstance in victims, location, time and motive. All the offenses occurred within ten days on the same street in Wilmington. All occurred in the late afternoon. In each case, two black males physically assaulted the attendant of a small business and took petty cash from the person of the victim or the cash box of the business. The assaults were of a similar nature. Each was without weapons, involved an element of surprise and involved choking, beating and kicking the victim. In each case, the robbers escaped on foot.

303 N.C. at 118, 277 S.E.2d at 394. As in *Bracey*, the three incidents here involved "similar *modus operandi*," occurred at similar businesses at the same time of day, and took place over a period of six days. In each case, two robbers went into the store, while the other robber waited, parked nearby, in the same car used in all of the robberies. In each case, the two robbers inside the store wore similar clothing, and one robber pretended to make a purchase, while the other pulled out the gun and demanded money after the cashier had opened the cash register. Based on the factors outlined in *Bracey*, we find a transactional connection between the three offenses in the instant case.

At the time the trial court ruled on joinder, the prejudice defendant complains of would not have been apparent. During the pretrial hearing on the motion, the State raised the following forecast of evidence: (1) a co-defendant would testify as to all three robberies; (2) the cashier from each store would testify; (3) the detectives, who investigated all three robberies, would testify; and (4) the same vehicle and gun were used for all three robberies.

On the issue of prejudice, defendant's only concern was that the jury, in general, would improperly "cumulatively pile up the evidence," despite the trial court's instruction to consider the evidence from each offense separately. The trial court rejected defendant's argument:

> [Defendant's position] would require that the Court assume that the jury will disregard instructions that will be given which will be on each substantive charge separately and that the jury will be required to find beyond a reasonable doubt and unanimously each of the elements of each crime. And that is an assumption the Court is not prepared to make. The mere possibility that . . . the jury might be confused by joinder is not sufficient to show a likelihood that the defendant cannot receive a fair trial.

Defendant has failed to show the trial court abused its discretion. The finding on the issue of prejudice is supported by previous decisions by our Supreme Court. *See State v. Moses*, 350 N.C. 741, 751, 517 S.E.2d 853, 860 (1999) (rejecting the defendant's argument that he was prejudiced because joinder permitted the State to "bootstrap" a weaker case to a stronger one), *cert. denied*, 528 U.S. 1124, 145 L. Ed. 2d 826 (2000) ; *State v. Chapman*, 342 N.C. 330, 343, 464 S.E.2d 661, 668 (1995) (rejecting defendant's argument that he was prejudiced by joinder because evidence of one crime "spilled over" into deliberations on the other crime), *cert. denied*, 518 U.S. 1023, 135 L. Ed. 2d 1077 (1996).

Presuming Latron's testimony was prejudicial, defendant failed to properly preserve the issue for appellate review. The alleged prejudice only became apparent *after* the trial court's ruling, and

defendant failed to challenge joinder after the State presented its evidence. "If in hindsight the court's ruling adversely affected defendant's defense, the ruling will not be converted into error." *State v. Williams*, 355 N.C. 501, 530, 565 S.E.2d 609, 626 (2002), (citing *State v. Jackson*, 309 N.C. 26, 32, 305 S.E.2d 703, 709 (1983)), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003). Once a new ground for prejudice becomes apparent, defendant's remedy would be a motion to sever the offenses. N.C. Gen. Stat. § 15A-927(a)(1); *Williams*, 355 N.C. at 530, 565 S.E.2d at 626 (citing *State v. Silva*, 304 N.C. 122, 127-28, 282 S.E.2d 449, 453 (1981)). Although defendant opposed the State's motion for joinder, defendant never made a pretrial motion to sever the offenses after they were joined. We find no error in the trial court's ruling. Defendant has failed to show any abuse of discretion or prejudice. This assignment of error is overruled.

IV. Review of Exhibits by the Jury During Deliberations

Defendant also argues the trial court erred by permitting the jury, during deliberations, to review several exhibits. We disagree.

A trial court's decision whether to grant or refuse a request by the jury to review evidence is reviewed for an abuse of discretion. *State v. Lang*, 301 N.C. 508, 510, 272 S.E.2d 123, 124 (1980), *disc. rev. denied*, 306 N.C. 747, 295 S.E.2d 761 (1982). It is well-established that "there is error when the trial court *refuses* to exercise its discretion in the erroneous belief that it

has no discretion as to the question presented." *Id.* at 510, 272 S.E.2d at 125 (emphasis supplied).

Defendant contends that the trial court erred by failing to exercise its discretion, and that the following statement is evidence of the trial court's erroneous belief: "[I'm] not sure I have the discretion to deny [the jury] an opportunity to see exhibits." It is not entirely clear whether the trial court "refused" to exercise discretion. Here, the trial court certainly questioned whether it had discretion to deny the request, but did not unequivocally refuse to exercise its discretion.

Presuming the trial court refused to exercise its discretion, defendant cannot demonstrate that any such error was prejudicial. In order to be entitled to a new trial, defendant bears the burden of showing that any error committed was prejudicial. N.C. Gen. Stat. § 15A-1443(a) (2007); *see Lang*, 301 N.C. at 510, 272 S.E.2d at 125 ("Where the error is prejudicial, the defendant is entitled to have his motion reconsidered and passed upon as a discretionary matter." (Internal citations omitted)). Error is prejudicial only if "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial . . . ." N.C. Gen. Stat. § 15A-1443(a).

Defendant argues that allowing the jury to review the surveillance videos and photograph constituted prejudicial error because the jury's "second look" at the exhibits presumably influenced the jury's decision to return guilty verdicts. We disagree.

Were we to agree the "second look" reinforced the jury's decision, we do not find it prejudicial. The exhibits had already been introduced into evidence, and the videos had already been played in front of the jury, with the two cashiers on the stand narrating the events. *See State v. Wagner*, 343 N.C. 250, 258, 470 S.E.2d 33, 37-38 (1996) (holding that the defendant was not prejudiced by the jury taking a narrative of the defendant's statement into the jury room where the exhibit had already been admitted into evidence and was consistent with the defendant's testimony during trial); *State v. Cannon*, 341 N.C. 79, 84-85, 459 S.E.2d 238, 242 (1995)(holding that defendant was not prejudiced by the jury taking photographs of the victims into the jury room where the photographs had previously admitted and shown to the jury to illustrate the testimony of witnesses). Defendant failed to show that there would have been a different result if the jury had to rely on memory with respect to the exhibits rather than being allowed a second opportunity to review them. This assignment of error is overruled.

V. Conclusion

Defendant has failed to show the trial court abused its discretion by allowing joinder of the three offenses for which defendant was tried. Defendant failed to properly preserve the issue of prejudice by failing to move for severance. Defendant failed to show the trial court committed prejudicial error by allowing the jury to review exhibits admitted into evidence during deliberations. Defendant received a fair trial, free from prejudicial errors he preserved, assigned and argued.

No error.

Judges BRYANT and ARROWOOD concur.

Report per Rule 30(e).