NO. COA11-182
NORTH CAROLINA COURT OF APPEALS

Filed: 1 November 2011

STATE OF NORTH CAROLINA

v. Moore County
No. 09 CRS 56A; 50966
09 CRS 51217; 51248
09 CRS 51252

DAVID O'NEAL TWITTY

Appeal by defendant from convictions entered 12 August 2010 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 30 August 2011.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly L. Wierzel, for the State.

John T. Hall, attorney for defendant.

ELMORE, Judge.

On 12 August 2010, David O'Neal Twitty (defendant) was convicted of 1) obtaining property by false pretenses and 2) as being a habitual felon. On 13 August 2010, defendant was sentenced as a Class C, Record Level VI Habitual Felon to 168-

211 months in prison. After careful consideration, we find no error in the judgments of the trial court.

I. Background

On 8 March 2009, defendant went to the Culdee Presbyterian Church where he told members of the congregation that his wife had died in an accident, and that he was collecting her belongings. He then told the congregation that he needed help, because he was low on funds and trying to get to South Carolina. None of this information was true. But, after hearing defendant's story, several members of the church gave him money.

On 23 March 2009, defendant was arrested on charges of obtaining property by false pretenses. On 7 April 2009, he was charged with three additional counts of obtaining property by false pretenses. On 13 April 2009, defendant was indicted for all offenses and also indicted as a habitual felon. A superseding indictment for the habitual felon charge was filed on 16 November 2009.

On 8 April 2009, Attorney Richard Conely was appointed to represent defendant. However, Conely was not authorized to defend felony cases. On 9 April 2009, Conely withdrew as counsel, and attorney Gary Morris was appointed to represent

defendant. On 24 November 2009, Morris withdrew as counsel at defendant's request. On 4 January 2010, attorney Jerry Rhoades was appointed to represent defendant. On 3 August 2010, defendant waived his right to counsel, and Rhoades was appointed as standby counsel.

Prior to trial, defendant made a motion to sequester the witnesses. The trial court denied that motion. At trial, defendant's former wife, Teresa Jackson, testified that she had been divorced from defendant for several years, and that to her knowledge defendant had not remarried. She further testified that she maintained regular contact with defendant. Also at trial, evidence was admitted that defendant had committed a similar offense at Mount Olive Baptist Church in Pittsboro.[1] The minister of that church, Shelby Lynn Stephens, took the stand and testified, over objection, that on 22 February 2009 he saw defendant asking for help at his church. During closing arguments, the prosecutor referred to defendant as a "con man."

[1] In Alamance County, defendant was convicted of obtaining property by false pretenses and having attained the status of habitual felon for his actions at Mount Olive Baptist Church. Defendant appealed that conviction. This Court heard that appeal on 13 April 2011. This Court filed an opinion finding no error on 17 May 2011. The facts of that case and the facts of the present case, along with the issues presented on appeal, are very similar.

Defendant objected to this statement, and the trial court overruled that objection.

On 12 August 2010, defendant was convicted of 1) obtaining property by false pretenses and 2) being a habitual felon. On 13 August 2010, defendant was sentenced as a Class C, Record Level VI Habitual Felon to 168-211 months in prison. Defendant now appeals. Additional relevant facts are established as follows.

II. Analysis

A. 404(b)

Defendant first argues that the trial court erred in admitting the testimony of Shelby Lynn Stephens under Rule 404(b). Specifically, defendant argues that this evidence was admitted in error for two reasons 1) no evidence was presented to show a connection between the two offenses and 2) the trial court did not make any findings to determine that the evidence was admissible under 404(b). We disagree.

Rule 404(b) states that:

> 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. Admissible

> evidence may include evidence of an offense committed by a juvenile if it would have been a Class A, B1, B2, C, D, or E felony if committed by an adult.

N.C. Gen. Stat. § 8C-1, Rule 404 (2009). Rule 404(b) is a rule of inclusion. *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). "When prior incidents are offered for a proper purpose, the ultimate test of admissibility is whether they are sufficiently similar and not so remote as to run afoul of the balancing test between probative value and prejudicial effect set out in Rule 403." *State v. West*, 103 N.C. App. 1, 9, 404 S.E.2d 191, 197 (1991) (citation omitted). Whether to exclude evidence under Rule 403 "is within the sound discretion of the trial court, and the trial court's ruling should not be overturned on appeal unless the ruling was manifestly unsupported by reason or [was] so arbitrary that it could not have been the result of a reasoned decision." *State v. Hyde*, 352 N.C. 37, 55, 530 S.E.2d 281, 293 (2000) (quotations omitted).

Here, prior to trial the State submitted a "Notice of Intent to Offer 404(b) Evidence at Trial." In that notice, the State indicated that the evidence would be used to show proof of motive, opportunity, intent, preparation, plan, knowledge, or identity. Therefore, the testimony of Stephens was offered for

a proper purpose. At trial, Stephens testified that on 22 February 2009 he heard and saw defendant tell the congregation of the Mount Olive Baptist Church that 1) his wife had been killed, 2) he only had seventy-five cents, and 3) he needed gas to get to Greensboro to retrieve his wife's belongings. These facts are sufficiently similar to the facts of the present case. In the present case, on 8 March 2009 defendant went to Culdee Presbyterian Church and told members of the congregation that 1) his wife had died in an accident, 2) he was collecting her belongings, and 3) he needed help, because he was low on funds. Furthermore, the incident at Mount Olive Baptist Church occurred approximately two weeks prior to the incident in the present case. Therefore, the two incidents were not remote in time. Thus, it is clear that the testimony of Stephens satisfied the requirements for inclusion under Rule 404(b): 1) The State offered the testimony for a proper purpose; 2) the facts of the prior incident are sufficiency similar to the facts of the present case; 3) the two incidents were not remote in time.

We conclude that the trial court did not err in admitting the testimony of Stephens.

B. Prosecutorial misconduct

Defendant next argues that the trial court erred in allowing prosecutorial misconduct. Defendant argues that prosecutorial misconduct occurred in two ways 1) the prosecutor made reference to the testimony of Stephens, which was admitted in error, and 2) the prosecutor referred to defendant as a "con man" in his closing arguments. We disagree.

We have already concluded that the testimony of Stephens was not admitted in error. Therefore, we will focus our analysis on defendant's second argument under this issue.

Our Supreme Court has held that "[t]he standard under which we review allegedly improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection." *State v. Lopez*, 363 N.C. 535, 538, 681 S.E.2d 271, 273 (2009) (quotations and citation omitted). The Supreme Court explained further that "[t]he trial court has broad discretion to control the scope of closing arguments, and generally, counsel's argument should not be impaired without good reason[.]" *Id.* (quotations and citations omitted). Furthermore, "prosecutors are given wide latitude in the scope of their argument and may argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom."

State v. Phillips, 365 N.C. 103, 135, 711 S.E.2d 122, 145 (2011) (quotations and citation omitted).

Here, evidence was presented at trial showing in sum that 1) defendant told members of the church that his wife had died, 2) defendant's only known wife was still living, 3) members of the church gave defendant money based on this false statement, and 4) defendant had told a similar story at Mount Olive Baptist Church. Then, during closing arguments the prosecutor referred to defendant as a "con man". Defendant objected, and the trial court overruled that objection. When reviewing the record, we conclude that the term "con man" is a reasonable inference drawn from the facts. *See State v. Harris,* 338 N.C. 211, 229-30, 449 S.E.2d 462, 472 (1994) (holding that 1) in a first-degree murder trial it was reasonable for the State to refer to the defendant as a "cold-blooded murdered" and 2) it was reasonable for the State to refer to the defendant as a "doper" when the defendant had a history of drug abuse).

Therefore, we conclude that no prosecutorial misconduct occurred here, and the trial court did not err with regards to this issue.

C. Motion to dismiss

Defendant next argues that the trial court erred by denying defendant's motion to dismiss the status of habitual felon. Defendant argues 1) that the trial court failed to dismiss the indictment when a superseding indictment was returned and 2) that there was insufficient evidence that defendant made false statements. We disagree.

With regards to defendant's first argument, our General Statutes provide that:

> If at any time before entry of a plea of guilty to an indictment or information, or commencement of a trial thereof, another indictment or information is filed in the same court charging the defendant with an offense charged or attempted to be charged in the first instrument, the first one is, with respect to the offense, superseded by the second and, upon the defendant's arraignment upon the second indictment or information, the count of the first instrument charging the offense must be dismissed by the superior court judge.

N.C. Gen. Stat. § 15A-646 (2009). However, our Supreme Court has established that:

> [a]lthough the better practice and, indeed, the required practice under the statute is for the trial court to dismiss any prior indictments charging an offense upon the arraignment of the defendant on a superseding indictment charging the same offense, the failure of the trial court to do so does not render the superseding indictment void or defective.

State v. Carson, 320 N.C. 328, 333, 357 S.E.2d 662, 666 (1987).

Here, on 13 April 2009 defendant was indicted as a habitual felon. Then, on 16 November 2009, a superseding indictment was returned, changing the allegations against defendant. The 13 April 2009 indictment was not dismissed after the superseding indictment was returned. Defendant claims that the superseding indictment was defective, because the first indictment was the charging document since it was never dismissed. However, as we have discussed, our Supreme Court has clearly established the rule that the failure of the trial court to dismiss the prior indictment does not render the superseding indictment void or defective. Therefore, defendant's first argument fails.

Defendant's second argument is that the trial court erred in denying his motion to dismiss based on insufficient evidence that defendant made false statements.

> When reviewing a defendant's motion to dismiss a charge on the basis of insufficiency of the evidence, this Court determines whether the State presented substantial evidence in support of each element of the charged offense. Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion. In this determination, all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence.

State v. Abshire, 363 N.C. 322, 327-28, 677 S.E.2d 444, 449 (2009) (quotations and citations omitted). Furthermore, "if there is substantial evidence--whether direct, circumstantial, or both--to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *Id*. at 328, 677 S.E.2d at 449.

Here, defendant told members of the church that his wife had died in an accident, and that he was collecting her belongings. Based on this information, the church members gave defendant money. At trial, defendant's former wife testified that she had been divorced from defendant for several years, and that to her knowledge defendant had not remarried. She further testified that she maintained regular contact with defendant. This testimony establishes that 1) defendant had only one wife, 2) she was not dead, and 3) defendant spoke to her regularly and thus he knew she was not dead. Therefore, we conclude that substantial evidence was presented at trial to prove that defendant made false statements.

The trial court did not err in denying defendant's motion to dismiss the status of habitual felon.

D. Speedy trial

Defendant next argues that the trial court erred in depriving him of a speedy trial, because the first attorney appointed to represent him was inappropriate. We disagree.

In reviewing a constitutional claim for denial of the right to a speedy trial, we consider four factors: 1) the length of the delay, 2) the reason for the delay, 3) the defendant's assertion of his right, and 4) any prejudice resulting from the delay. *State v. Spivey*, 357 N.C. 114, 118, 579 S.E.2d 251, 254 (2003). None of these factors is dispositive, and there is no mandated method of weighing them. *Id.* at 118, 579 S.E.2d at 255. Rather, this court must engage in a balancing test based on the facts of each case. *Id.*

With regards to the first factor, delays that approach one year from date of arrest until commencement of trial are considered significant enough to trigger an inquiry into the remaining factors. *Id.* at 119, 579 S.E.2d at 255. Here, the delay between the arrest and trial was sixteen months. Therefore, we will turn our analysis to the remaining factors.

First, we must examine the cause of the delay. Our Supreme Court has held that "defendant ha[s] the burden of showing that the delay was caused by the ***neglect*** or ***willfulness*** of the prosecution." *Id.* (emphasis in original). Here, defendant

argues that the trial proceedings were delayed, because the State appointed an inappropriate counsel to represent him. Defendant argues that the attorney who was first appointed to represent him was not authorized to defend felony cases, and therefore his trial was delayed. We disagree with defendant.

The rule established by our Supreme Court clearly indicates that the delay must be caused by the neglect or willfulness of the prosecution. The prosecution has no connection or control over appointment of defense counsel. Therefore, defendant's argument here fails.

Next, we must analyze whether defendant correctly asserted his Sixth Amendment right to a speedy trial. Here, defendant argues that he correctly asserted this right through *pro se* motions he submitted to the trial court on: 1) 6 April 2009, 2) 20 July 2009, 3) 27 July 2009, 4) 9 September 2009, 5) 16 November 2009, and 6) 25 November 2009. We agree in part with defendant's argument.

"[A] defendant does not have the right to be represented by counsel and to also appear pro se." *Spivey*, 357 N.C. at 121, 579 S.E.2d at 256 (citation omitted). "Having elected for representation by appointed defense counsel, [a] defendant cannot also file motions on his own behalf or attempt to

represent himself." *State v. Grooms*, 353 N.C. 50, 61, 540 S.E.2d 713, 721 (2000) (citing N.C. Gen. Stat. § 1-11), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001)). A defendant who files *pro se* motions for a speedy trial while represented has "waived appellate review of this issue by failing to properly raise the constitutional issue in the trial court." *Id.* at 62, 540 S.E.2d 721.

Here, defendant was appointed counsel on 8 April 2009. Defendant remained represented from that time until 24 November 2009, when Morris withdrew as counsel. Defendant was not appointed new counsel until 4 January 2010. Defendant then remained represented from that time until he waived his right to counsel on 3 August 2010. In sum, defendant was represented from 8 April 2009 until 24 November 2009 and again from 4 January 2010 until 3 August 2010. Therefore, the *pro se* motions for speedy trial that defendant filed on 1) 20 July 2009, 2) 27 July 2009, and 3) 9 September 2009 were ineffective. However, defendant did properly file two *pro se* motions for a speedy trial on 1) 6 April 2009 and 2) 25 November 2009. Therefore, we conclude that defendant did correctly assert his Sixth Amendment right to a speedy trial, but fewer times than he claims.

Lastly, we must determine whether any prejudice resulted from the delay. Defendant argues that he was prejudiced by the delay because he suffered anxiety over his charges. We disagree with defendant's argument.

Reducing the anxiety and concern of defendants is one of the motivations behind the constitutional right to a speedy trial, but a "defendant must show actual, substantial prejudice." *Spivey*, 357 N.C. at 122, 579 S.E.2d at 257. Our Supreme Court has held that "claims of faded memory and evidentiary difficulties[,] [being] inherent in any delay[,]" do not establish actual, substantial prejudice. *State v. Goldman*, 311 N.C. 338, 345, 317 S.E.2d 361, 365 (1984). Similarly, we conclude that most defendants likely experience some form of anxiety and concern over their charges, and such an experience can hardly be labeled as being substantially prejudicial. Therefore, we conclude that defendant has failed to show that the delay in his trial resulted in prejudice.

When balancing all four factors, we conclude that the trial court did not err in depriving defendant of a speedy trial. Defendant failed to show 1) that the delay was caused by the

neglect or willfulness of the prosecution and 2) that he was prejudiced by the delay.[2]

E. Sentencing

Defendant next argues that the trial court erred in sentencing defendant. Defendant argues 1) that the trial court miscalculated the number of points when determining defendant's prior record level, 2) that the sentence is ambiguous, because the trial court sentenced defendant in the aggravated range without finding aggravating factors, and 3) that his sentence violated his Eight Amendment protection against cruel and unusual punishment. We disagree.

We will first address whether the trial court miscalculated the number of points when determining defendant's prior record level. Defendant argues that since two misdemeanor larceny convictions were obtained on the same day, 11 April 2001, the trial court should have counted them as one point, and not two.

Defendant's argument is a correct statement of the law. According to our General Statutes, "[f]or purposes of determining the prior record level, if an offender is convicted

[2] This Court also notes that defendant's first attorney was appointed on 8 April 2009. It was discovered that this attorney was not authorized to defend felony cases, and a new attorney was appointed on 9 April 2009. Therefore, defendant's argument that the appointment of an inappropriate attorney caused the delay in his trial seems, in itself, lacking in merit.

of more than one offense in a single superior court session during one calendar week, only the conviction for the offense with the highest point total is used." N.C. Gen. Stat. § 15A-1340.14 (2009). However, upon analyzing the record here, it is obvious that the trial court correctly counted the two misdemeanor larceny convictions as only one point:

> THE COURT: Got two counts of misdemeanor larceny on April the 11th, 2001 convictions. How many points does he get for that?
>
> [the State]: Just one, Your Honor.
>
> THE COURT: That's what I thought, because the General Assembly said, even though you're convicted of two misdemeanors on the same day, it only counts as one conviction for sentencing purposes?
>
> [the State]: Yes, sir.

Therefore, we conclude that the trial court correctly calculated the number of points when determining defendant's prior record level.

Next, we will address defendant's argument that the sentence was ambiguous because the trial court sentenced him in the aggravated range without finding aggravating factors.

Here, defendant was convicted of obtaining property by false pretenses. The trial court sentenced defendant to 168-211 months in prison as a Class C, Habitual Felon with a prior record level of VI. A term of 211 months is the top of the

presumptive range for a defendant with a prior record level of VI convicted of a Class C felony, and it is also listed as the lowest sentence in the aggravated range. Defendant contends that this fact creates ambiguity and asserts that he received an aggravated sentence.

This argument has been rejected by this Court on numerous prior occasions. This Court has repeatedly held that "[t]he fact that the trial court could have found aggravating factors and sentenced defendant to the same term does not create an error in defendant's sentence." *State v. Ramirez*, 156 N.C. App. 249, 259, 576 S.E.2d 714, 721 (2003). We find defendant's argument with regards to this issue to be frivolous. Accordingly, we conclude that the trial court committed no error.

Defendant's final argument with regards to this issue is that his sentence violated his Eight Amendment protection against cruel and unusual punishment. Again, this Court has repeatedly held that "[a] sentence consistent with the [Structured Sentencing] statute does not constitute cruel and unusual punishment under the Eighth Amendment." State v. Hall, 174 N.C. App. 353, 355-56, 620 S.E.2d 723, 725 (2005). Again, we find defendant's argument here to be entirely frivolous.

Accordingly, we conclude that the trial court committed no error.

F. Motion to sequester witnesses

Finally, defendant argues that the trial court erred in denying defendant's motion to sequester witnesses. We disagree.

A trial court's ruling on a motion to sequester witnesses "rests within the sound discretion of the trial court, and the court's denial of the motion will not be disturbed in the absence of a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Garcell*, 363 N.C. 10, 41, 678 S.E.2d 618, 638 (2009) (citation omitted). Furthermore, "where a defendant fail[s] to point to any instance in the record where a witness conformed his or her testimony to that of another witness, the defendant fail[s] to show an abuse of discretion in the trial court's denial of a motion to sequester witnesses." *State v. Brown*, 177 N.C. App. 177, 182-83, 628 S.E.2d 787, 790 (2006).

Here, defendant made a motion to sequester the witnesses. The trial court then presented both defendant and the State with the opportunity to be heard. The State argued that "most of the witnesses will be coming in individually anyway because they're all coming from separate locations, particularly the 404(b)

witnesses." Next, the trial court denied defendant's motion. Since the trial court allowed both parties to be heard prior to making a ruling, we conclude that the ruling of the trial court was not arbitrary. In addition, defendant argues on appeal only that he believes he observed witnesses signaling or giving facial expressions to other witnesses on the stand. Defendant fails to point to any specific instance in the record where a witness conformed his testimony to the testimony of another witness.

Therefore, we conclude that the trial court did not err in denying defendant's motion to sequester the witnesses.

III. Conclusion

In sum, we conclude that there was no error in the judgments of the trial court.

No error.

Judges McGEE and HUNTER, JR., Robert N., concur.

Report per Rule 30(e).