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NO. COA12-257
NORTH CAROLINA COURT OF APPEALS

Filed: 18 September 2012

STATE OF NORTH CAROLINA

v.

Mecklenburg County
Nos. 11 CRS 7641, 18256-57

TERRELL WILLIAMS,
Defendant.

Appeal by defendant from judgment entered 18 November 2011
by Judge Richard D. Boner in Mecklenburg County Superior Court.
Heard in the Court of Appeals 27 August 2012.

*Roy Cooper, Attorney General, by Elizabeth N. Strickland,
Special Deputy Attorney General, for the State.*

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

MARTIN, Chief Judge.

Defendant Terrell Williams appeals from the judgment
entered upon jury verdicts finding him guilty of felony breaking
or entering and conspiracy to commit felony breaking or
entering, and upon his plea of guilty to attaining habitual
felon status.

The State's evidence at trial tended to show that on 6 December 2010, Jason Miguel Solomon left his home to go to work at 6:30 a.m. When he left his home, it was secure and no one was there; the doors and windows were locked, the alarm system was set and activated to emit a siren if any doors or windows were opened, and there were no broken windows. Solomon did not give anyone permission to enter his home while he was gone. Around 11:00 a.m., Solomon received a call from Charlotte Mecklenburg Police Department (CMPD) informing him that the alarm was going off at his home and that he needed to come home to file a police report. When Solomon arrived at his home about thirty minutes later, he was greeted by a neighbor and two CMPD police officers. An officer escorted Solomon around to the back of his home and showed him that a glass window pane was broken and the window had been pushed up about two inches.

Marvin Platero, who lives across the street from Solomon, was at home on the morning of 6 December 2010. He saw a black male try to open Solomon's door, then walk back to a wine- or cherry-colored Crown Victoria and speak to another black male with dreadlocks, later identified as defendant, who was in the car. A few moments later, defendant got out of the car and joined the other man in walking around to the back of Solomon's

house. Platero observed defendant put a glove on his hand. Meanwhile, the driver of the Crown Victoria circled the block two or three times.

Platero heard the alarm immediately thereafter, and saw the two men walk away from the house. As defendant walked away, Platero saw him remove the glove and dispose of it in a trash can in front of a neighboring house. Platero observed the two men get into the Crown Victoria about a half-block away and then called the police at 10:40 a.m., giving a description of the vehicle, including the tag number.

Officer Suarez of the CMPD arrived at Solomon's home five to seven minutes later. He observed the broken pane and lifted window, but noticed that the blinds were still down and a large piece of furniture was not moved out of the way. Officer Suarez took Platero's statement and broadcast a description of the vehicle and suspects over his radio.

Within a few minutes, Officer Scott Rickards of the CMPD spotted the Crown Victoria about two miles from Solomon's home and radioed for backup. Once the backup arrived, he initiated a traffic stop of the vehicle at approximately 11:00 a.m. Defendant was sitting in the front passenger side of the vehicle. When asked his name, defendant identified himself as

Marcus Johnson, an alias. The traffic stop was recorded by a digital video recorder (DVR) attached to Officer Rickards' patrol vehicle.

At 11:07 a.m., Officer Suarez arrived at the scene of the traffic stop with Platero to conduct a show-up identification. Platero identified defendant as the man who got out of the car and noted that he was 100 percent certain of the identification. Defendant was then taken to the police station to be interviewed. Burglary Detective Jamie Jones testified that he asked defendant if he wished to speak with him and defendant answered "no." After the prosecutor asked Jones about this encounter, and Jones had answered the question, defendant's counsel objected and the trial court sustained the objection.

Just before trial, defendant's counsel filed a motion to continue the matter because he had received "some notes" a week before with "some mention of a glove that was not part of the [d]iscovery." Defendant also personally asked the court to continue his case because he felt he and his lawyer were not ready for trial. Defendant's counsel explained that he thought that defendant's court date in October was his original bond hearing, but the prosecutor corrected him that the case was

actually set for trial in October, but it had not been reached. The trial court denied the motion to continue.

Platero testified at trial that he told an officer about the glove and that the officer opened the trash can and saw the glove; however, this was not mentioned in Platero's written statement, prepared that day. Officer Suarez testified that Platero had mentioned an item being thrown in the trash, but that he was not the one who looked in the trash can. Apparently, as officers were completing paperwork at Platero's house, the trash can was emptied into a dump truck before the glove could be retrieved. The glove was never found.

The State presented a DVR recording of the traffic stop which included the show-up identification of defendant to the jury to corroborate the officers' testimony. Defense counsel objected on the grounds that he had not seen the particular recording and that it had been deemed not relevant. The State explained that the disc given to counsel several months prior contained four separate recordings, one of which was not relevant and would not be played to the jury. The trial court instructed the jury before playing the recording that the recording was being admitted "for the sole purpose of

corroborating this and the other witnesses if you find it does so. Do not consider it for any other purpose."

At trial, defendant did not testify or put on any evidence. Defendant appeals.

On appeal, defendant contends the trial court erred in denying his motion to dismiss for insufficient evidence of an intent on his part to commit a felony or larceny after the breaking; in denying his motion to dismiss based on Detective Jones' comment regarding defendant's silence, in violation of his Fifth Amendment rights; and in denying his motion to continue the trial. Defendant also alleges he received ineffective assistance of counsel.

I.

Defendant contends the trial court erred in denying his motion to dismiss because the State failed to present sufficient evidence of one of the elements of felony breaking or entering: "that defendant had the intent to commit a felony or larceny therein." We disagree.

"Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense

included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.'" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

Under N.C.G.S. § 14-54, a person is guilty of felonious breaking or entering if there is substantial evidence of the following elements: (1) the breaking or entering, (2) of any building (3) with the intent to commit any felony or larceny therein. N.C. Gen. Stat. § 14-54(a) (2011); *State v. Williams*, 330 N.C. 579, 585, 411 S.E.2d 814, 818 (1992). "If the evidence presents no other explanation for breaking into the building, and there is no showing of the owner's consent, intent to commit a felony inside may be inferred from the circumstances surrounding the occurrence." *State v. Hamilton*, 132 N.C. App.

316, 319, 512 S.E.2d 80, 83 (1999) (internal quotation marks omitted).

Here, defendant presented no evidence at his trial; thus, there was no other explanation for the breaking. Furthermore, Solomon testified that he did not give defendant or any other person permission to enter his home. Thus, defendant's intent to commit a felony or larceny may be inferred from the circumstances. Defendant attempted to enter the premises by breaking and pushing up the back window, but left as soon as the alarm sounded, getting into a car which had been circling the block in the meantime. We find that these circumstances are sufficient to support an inference of an intent to commit a felony or larceny, and therefore, this argument is overruled.

II.

Defendant next contends the trial court erred in denying his motion to dismiss after Detective Jamie Jones improperly referenced defendant's silence during his testimony, thereby violating defendant's right against self-incrimination under the Fifth Amendment.

It is well established that a criminal defendant has a right to remain silent under the Fifth Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment, and under Article I, Section 23 of the North Carolina

Constitution. A defendant's decision to remain silent following his arrest may not be used to infer his guilt, and any comment by the prosecutor on the defendant's exercise of his right to silence is unconstitutional.

State v. Ward, 354 N.C. 231, 266, 555 S.E.2d 251, 273 (2001) (citation omitted). While the State may sometimes use a defendant's silence at trial for impeachment purposes, see *State v. Boston*, 191 N.C. App. 637, 648, 663 S.E.2d 886, 894 *appeal dismissed and disc. review denied*, 362 N.C. 683, 670 S.E.2d 566 (2008), the State can never use defendant's silence as substantive evidence of his guilt. See *Ward*, 354 N.C. at 266, 555 S.E.2d at 273. "A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443(b) (2011).

Here, defendant did not testify. The reference to defendant's silence came during the State's case-in-chief, and was elicited from Detective Jamie Jones by the prosecutor:

Q: Did you ever have an opportunity or attempt an opportunity to interview Mr. Williams?

[Defense counsel]: Objection.

THE COURT: Overruled.

A: Mr. Williams was sitting in the common area of our office because we have limited - we only have one interview room. He was sitting in one of the office chairs. *I confronted him, asked him if he wished to talk to me, he basically shook his head, said no.*

[Defense counsel]: Objection

THE COURT: Well, sustained.

(Emphasis added.) Thus, comment on defendant's unwillingness to talk to police was introduced as substantive evidence, not as impeachment evidence, and its introduction was error.

This Court may consider a number of factors in determining if the reference to defendant's silence was prejudicial, thereby requiring a new trial,

including: whether the State's other evidence of guilt was substantial; whether the State emphasized . . . [defendant's] silence throughout the trial; whether the State attempted to capitalize on [defendant's] silence; whether the State commented on [defendant's] silence during closing argument; whether the reference to [defendant's] silence was merely benign or de minimis; and whether the State solicited the testimony at issue.

Boston, 191 N.C. App. at 652-53, 663 S.E.2d at 896-97.

This single reference to defendant's silence, to which defense counsel's objection was promptly sustained, was de minimis. See *State v. Alexander*, 337 N.C. 182, 196, 446 S.E.2d 83, 91 (1994) (holding that where the prosecutor's questions were "relatively benign," the prosecutor did not emphasize the fact that defendant did not wish to speak after being read his rights); *State v. Adu*, 195 N.C. App. 269, 277-78, 672 S.E.2d 84, 89-90, *appeal dismissed and disc. review denied*, 363 N.C. 375, 680 S.E.2d 210 (2009) (holding the error was harmless when the State made mention of defendant's failure to tell his "side of the story" briefly on two occasions during the trial, once during closing argument, but these references were de minimis). The State did not mention defendant's silence during the examination of its other witnesses or in closing argument to the jury. Thus, it does not appear from the record that the State attempted to "capitalize" on defendant's silence. Moreover, there was substantial evidence of defendant's guilt, including Platero's eyewitness account which led to the traffic stop of the Crown Victoria and his show-up identification of defendant. We therefore conclude that the trial court's error in allowing Detective Jones' testimony regarding defendant's silence was harmless beyond a reasonable doubt.

III.

Defendant next argues the trial court erred in denying defendant's motion to continue because his trial counsel was not prepared for trial, did not have adequate time to prepare with regard to Platero's testimony concerning the glove, and because his counsel apparently did not understand the procedural history of his case. We disagree.

"Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review." *State v. Taylor*, 354 N.C. 28, 33, 550 S.E.2d 141, 146 (2001), *cert. denied*, 535 U.S. 934, 152 L. Ed. 2d 221 (2002). "When a motion to continue raises a constitutional issue," however, "the trial court's ruling is fully reviewable upon appeal." *Id.*

To establish a constitutional violation, a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense. To demonstrate that the time allowed was inadequate, the defendant must show how his case would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion.

State v. Williams, 355 N.C. 501, 540-41, 565 S.E.2d 609, 632 (2002) (citations and internal quotation marks omitted), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003).

Defendant has not shown how his case would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion. Defense counsel received the notes regarding the glove the week prior to trial, an adequate amount of time to prepare, considering the glove was never found, there was no further discovery that needed to be made, no tests to be run, and no expert witnesses to evaluate the evidence. Defense counsel thoroughly cross-examined Platero regarding the glove, including why it had not been mentioned as a part of his statement.

Furthermore, defense counsel's misunderstanding regarding the procedural history of defendant's case was not prejudicial to defendant. Defense counsel filed a motion in limine prior to trial, participated in plea negotiations, conducted thorough cross-examinations of the victim, eyewitness Platero, and police officers, and made objections at trial, some of which were sustained. Therefore, this argument is overruled.

IV.

Defendant also contends he received ineffective assistance of counsel based on counsel's failure to adequately prepare for trial. Defendant alleges defense counsel was unprepared for trial, characterized by his unfamiliarity with the history of

defendant's case; failure to conduct an independent investigation related to the glove; and his confusion regarding the DVR evidence. We disagree.

To succeed in proving ineffective assistance of counsel,

a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citations and internal quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006).

As previously discussed, defense counsel's misunderstanding regarding the procedural history and his preparation with regard to the glove were not prejudicial. Similarly, defense counsel's misunderstanding about the DVR recording was not prejudicial; the recording merely corroborated the officer's accounts of the traffic stop and Platero's identification of defendant. Because the evidence was merely cumulative and illustrative of the

officers' testimony, there is not a reasonable probability that, but for counsel's confusion, the result of the proceeding would have been different.

No error.

Judges GEER and STROUD concur.

Report per Rule 30(e).