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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-938

Filed: 1 August 2017

Wayne County, Nos. 13 CRS 50677, 50679

STATE OF NORTH CAROLINA

v.

CHRISTOPHER SCOTT ELLIS

Appeal by defendant from judgments entered 3 December 2015 by Judge Paul L. Jones in Wayne County Superior Court. Heard in the Court of Appeals 5 April 2017.

Attorney General Roy Cooper¹, by Assistant Attorney General Letitia C. Echols, for the State.

Ward, Smith & Norris, P.A., by Kirby H. Smith, III, for defendant-appellant.

CALABRIA, Judge.

Where offenses occurred on different days, and were not so distinctly similar that they served almost as a fingerprint, the trial court erred in joining the offenses for trial. We vacate the trial court's judgments and remand for new trials.

¹ When the briefs and records in this case were filed, Roy Cooper was Attorney General. Joshua H. Stein was sworn in as Attorney General on 1 January 2017.

I. Factual and Procedural Background

On 5 February 2013,² Christopher Scott Ellis (“defendant”) went to visit family friend Tony McCullen (“McCullen”). Defendant informed McCullen that his truck had run out of gas, and asked permission to park the truck on McCullen’s land while he went to get gas. Later, McCullen saw another truck pull up outside his home, and saw defendant near defendant’s truck, but without a gas can. Minutes later, McCullen heard both trucks drive away. Some time later, a law enforcement officer with the Wayne County Sheriff’s Department (“WCSD”) came to McCullen’s door and asked him about a truck in a ditch nearby. McCullen walked out of his home, and saw a truck that he did not recognize as defendant’s. McCullen observed that the truck had a crane on it.

That night, Mark Keene (“Mr. Keene”) passed McCullen’s property on his way home from visiting family. Mr. Keene saw the truck in the ditch, and thought that it resembled one used on his hog farm. He contacted his sister, Tracy Keene (“Tracy”), who, based upon Mr. Keene’s description of the truck, believed that it belonged to Kenneth Westbrook (“Westbrook”), who worked on Mr. Keene’s farm. Mr. Keene went to the ditch and identified the truck, which was used to move hogs on his farm on a daily basis. Mr. Keene saw defendant’s truck pass. As he looked in the direction

² The date of the offense indicated in the indictment below was 1 February 2013, however the testimony at trial indicated that the offense occurred on 5 February 2013. For uniformity, we refer to the date according to the testimony at trial, 5 February 2013.

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the truck had gone, he saw tools laying beside the road, which Mr. Keene recognized as coming from his hog farm. After Tracy called Westbrook, Westbrook and Mr. Keene attempted to restart Westbrook's truck, but were unable to do so, as the wiring had been torn out. Later, back on the farm, Westbrook noticed that the door to the farm office had been broken in, the lock was broken, the office had been ransacked, and several pieces of farm equipment had been stolen, including eight hog feeders.

A few days after the theft from the Keene farm, WCSD Detective Robert Parchman ("Det. Parchman") met Jason Martin ("Martin"), Westbrook's partner, at Goldsboro Metal Recycling. There, they found three hog feeders which Martin identified as belonging to the Keenes. Upon interviewing McCullen, Det. Parchman learned that defendant was in the area of the Keene farm on 5 February 2013. On 7 February 2013, Det. Parchman requested a history of defendant's transactions with Goldsboro Metal Recycling from manager Christopher Talbot ("Talbot").

On 9 February 2013, Det. Parchman was at Goldsboro Metal Recycling when defendant arrived with more metal to sell. In defendant's truck was a pile of car tire rims and other metal objects. Eventually, it was determined that these tire rims belonged to Durwood Arnette ("Arnette"), owner of Arnette's Used Tires. Defendant asserted, however, that he did not know that the tire rims were stolen, or Arnette's property.

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Defendant was indicted in case 13 CRS 50677 for felony breaking or entering, larceny pursuant to breaking and/or entering, and felony possession of stolen goods, with respect to Arnette's tire rims. He was also indicted in case 13 CRS 50679 for felony larceny and possession of stolen goods with respect to the hog feeders, and a two-wheeled cart, taken from the Keenes' farm. The State, over objection, moved to join the offenses for trial, which the trial court allowed.

In 13 CRS 50677, the jury found defendant not guilty of breaking or entering, and guilty of felonious larceny pursuant to breaking or entering and felonious possession of stolen goods. The trial court arrested judgment on the possession charge, and sentenced defendant to a minimum of 5 months and a maximum of 15 months' imprisonment in the custody of the North Carolina Department of Adult Correction for larceny pursuant to breaking or entering. In 13 CRS 50679, the jury found defendant guilty of both felonious larceny and felonious possession of stolen goods. The trial court arrested judgment on the possession charge, and sentenced defendant to a minimum of 5 months and a maximum of 15 months' imprisonment in the custody of the North Carolina Department of Adult Correction for larceny. These sentences were to run consecutively.

Defendant appeals.

II. Joining of Charges

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In his first argument, defendant contends that the trial court erred in joining all of the charges against him for trial. We agree.

A. Standard of Review

We review a trial court's denial of a motion to sever for an abuse of discretion. *State v. McDonald*, 163 N.C. App. 458, 463, 593 S.E.2d 793, 796, *disc. rev. denied*, 358 N.C. 548, 599 S.E.2d 910 (2004). But, if the joined charges possess no transactional connection, then the trial court's decision to join is improper as a matter of law. *State v. Owens*, 135 N.C. App. 456, 458, 520 S.E.2d 590, 592 (1999). A defendant waives his right to sever if he fails to renew his pretrial motion to sever "before or at the close of all the evidence." N.C. Gen. Stat. § 15A-927(a)(2) (2013); *see also State v. Agubata*, 92 N.C. App. 651, 661, 375 S.E.2d 702, 708 (1989) (holding that defendant who moved to sever at the first day of trial but failed to renew his motion at the close of all the evidence waived his right to sever). If a defendant waives his right to sever, our review is limited to reviewing whether the trial court abused its discretion at the time of its decision to join. *McDonald*, 163 N.C. App. at 463-64, 593 S.E.2d at 796-97; *State v. Silva*, 304 N.C. 122, 127-28, 282 S.E.2d 449, 452-53 (1981).

State v. Larkin, 237 N.C. App. 335, 348, 764 S.E.2d 681, 690-91 (2014).

B. Analysis

At the start of trial, the State moved to join three charges against defendant for trial. Defendant moved to sever the offenses, on the basis that "there's three separate dates of offense and three separate victims." The trial court denied defendant's motion to sever, and joined the offenses for trial. Although defendant made motions to dismiss the charges at the close of the State's evidence and the close

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of all the evidence, defendant did not renew his motion to sever. Our review is therefore limited only to whether the offenses were transactionally related, and if so, “whether the trial court abused its discretion at the time of its decision to join.” *Larkin*, 237 N.C. App. at 348, 764 S.E.2d at 691.

Our statutes dictate our procedure as to the joinder of offenses. Two or more offenses may be joined when they are based upon the same act or transaction, or when they are based on “a series of acts or transactions connected together or constituting parts of a single scheme or plan.” N.C. Gen. Stat. § 15A-926(a) (2015). “This rule requires a two-step analysis: (1) a determination of whether the offenses have a transactional connection, and (2) if there is such a connection, consideration then must be given as to whether the accused can receive a fair hearing on more than one charge at the same trial. A decision to consolidate offenses is within the discretion of the trial court, however, if the consolidated charges have no transactional connection, then the consolidation is improper as a matter of law.” *State v. Perry*, 142 N.C. App. 177, 180-81, 541 S.E.2d 746, 748-49 (2001) (citations and quotation marks omitted).

It is not clear from the record that the trial court engaged in the two-prong analysis observed in *Perry*. Even assuming *arguendo* that the trial court did so, it does not appear that a transactional connection existed between the offenses.

During the hearing on the motions to join and sever, the State noted that while there were “three different files involving . . . three different incidents, two victims,”

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there were also “two files involving the same victim, one file involving another victim, and it all happened at the same time, the same, you know, few days[.]” On appeal, the State further clarifies that all of the offenses, occurring in the same few days, involved metal goods which defendant allegedly stole and sold for scrap.

Defendant argues that he “was charged with three sets of offenses occurring on three different dates involving three different sets of victims. As a result, there was no judicial economy in joining these cases for trial[.]” In support of his position, defendant cites *State v. Williams*, 74 N.C. App. 695, 329 S.E.2d 705 (1985). In *Williams*, the defendant was charged with and convicted of a total of “thirteen counts of second-degree burglary, eleven counts of felonious larceny, two counts of conspiracy, and one count of attempted safecracking[.]” *Id.* at 695, 329 S.E.2d at 706. Some of these offenses occurred on a weekend in October of 1982, the others on a weekend in January of 1983. The trial court allowed the joinder of all offenses. On appeal, this Court addressed the joinder, specifically whether the offenses were transactionally related. We held that:

One circumstance in which offenses are transactionally related so that they may be joined for trial occurs when they arise out of a single overall conspiracy. *State v. Silva*, 304 N.C. at 127[, 282 S.E.2d 449]. Another is when a series of crimes are so closely related in time that they appear to be parts of a continuous crime spree. *State v. Avery*, 302 N.C. 517, 276 S.E.2d 699 (1981) (series of crimes during a two day period of escape from prison); *State v. Clark*, 301 N.C. 176, 270 S.E.2d 425 (1980) (offenses one after the other on the same afternoon); *State v. Greene*, 294 N.C. 418,

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241 S.E.2d 662 (1978) (two sexual assaults within three hours); *State v. Davis*, 289 N.C. 500, 223 S.E.2d 296, *death penalty vacated*, 429 U.S. 809[, 50 L.Ed.2d 69] (1976) (four offenses within two and a half hours).

In the absence of a conspiracy charge that serves 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.

Id. at 697, 329 S.E.2d at 707 (citation omitted). We ultimately held, as a matter of law, that joinder of these cases was inappropriate, their similarity in style and proximity in time notwithstanding.

In the instant case, in the indictment in case number 15 CRS 50677, defendant was charged with felony breaking or entering, larceny pursuant to breaking or entering, and felony possession of stolen goods, all resulting from the events of 9 February 2013. Those charges related to entering Arnette’s building and stealing twelve tire rims. In the indictment in case number 15 CRS 50679, defendant was charged with felony larceny and possession of stolen goods, both resulting from the events of 5 February 2013. Those charges related to stealing the Keenes’ hog feeders and two-wheeled cart. These offenses happened on different days, and no conspiracy charges were filed. Pursuant to *Williams*, they could not have been joined for trial “unless the circumstances of each offense are so distinctly similar that they serve almost as a fingerprint.” *Id.* at 697, 329 S.E.2d at 707.

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Here, however, the offenses were quite different. The offense in 15 CRS 50677 involved defendant allegedly breaking into a building and stealing tire rims. The offense in 15 CRS 50679 involved defendant allegedly stealing hog feeders which were stored outdoors. The only similarity that the State can trace, other than the fact that both offenses were larcenies, is the fact that both involved the theft of metal goods to be sold for scrap. It is clear that the State did not present adequate evidence of a transactional connection between the offenses. Absent a forecast of such evidence, there was no way for the trial court to reasonably determine that such a connection existed at the pretrial hearing.

Because the trial court lacked the evidence before it to determine that a transactional connection existed between the offenses, we hold that the trial court abused its discretion in granting joinder. Accordingly, we vacate the trial court's judgments and remand for new trials.

III. Acting in Concert

In his second argument, defendant contends that the trial court erred in instructing the jury on the theory of acting in concert. Because we have vacated the trial court's judgment and remanded for new trials, we need not address this argument.

VACATED AND REMANDED.

Judges DIETZ and MURPHY concur.

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Report per Rule 30(e).