IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 19-1008

Filed: 2 June 2020

Orange County, No. 18 CRS 51505-06, 51512, 51519-20, 198-200

STATE OF NORTH CAROLINA

v.

LERON KELLY OWENS, Defendant.

Appeal by defendant from judgments entered 29 April 2019 by Judge Thomas H. Lock in Orange County Superior Court. Heard in the Court of Appeals 28 April 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Martin T. McCracken, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C Katz, for defendant-appellant.

YOUNG, Judge.

This appeal arises out of convictions for multiple breaking and enterings. The trial court did not err in joining the charges for trial, in allowing the introduction of 404(b) evidence, or in denying Defendant's Motion to Dismiss. While the trial court

erred in denying the motion to suppress, the error was not prejudicial. Accordingly, we affirm the trial court's decision.

I. Factual and Procedural History

On 6 June 2018, law enforcement arrested Leron Kelly Owens ("Defendant") on six arrest warrants alleging various crimes of breaking and entering, larceny and possession of a firearm by a felon, as well as misdemeanor injury to real property. Defendant was subsequently indicted on 24 July 2018 on 73 charges arising from a series of 23 residential break-ins throughout Orange County. The charges came on for trial on 15 April 2019. At the close of the State's evidence, the State voluntarily dismissed six charges arising from two burglaries. The trial court then dismissed 40 charges for insufficient evidence. The remaining charges were presented to the jury.

The jury found Defendant guilty of sixteen charges, although the trial court vacated three of those convictions. Defendant pleaded guilty to the aggravating factor that he had committed the offenses while on pre-trial release. Defendant appeals from a consolidated sentence of 252 to 369 months incarceration. Four of the convictions were related solely to break-ins. Those four convictions will be addressed individually in this opinion.

26 May 2018 Palmer break-in

On 26 May 2018, Eric Palmer ("Palmer") and his mother returned from a funeral to find their house broken into and the bedrooms ransacked. Palmer's

neighbor claimed to have seen a car pull into Palmer's driveway between 3:00 pm and 4:00 pm, but that it was a car he had seen quite often and believed it to be the car of Palmer's aunt's home health worker. Palmer's aunt lived with him and his mother. However, a second neighbor testified that he had been monitoring his home through a Nest system and had observed a car drive up to his home at 4:26 pm. That video was given to law enforcement and showed a gray car with a dent in the hood.

30 May 2018 McKee break-in

On 30 May 2018, Michelle McKee ("McKee") received a call from her nanny that the back door to her home had been broken. When McKee returned home, McKee found a rock had been used to break her back door. Retired law enforcement officer, Jon Peter, testified that he saw Defendant driving down a nearby street about 3:30 pm that afternoon. Defendant was driving a "light blue, kind of silver-ish, blue sedan." Similarly, another neighbor, Rosalind Wilson, testified that she was walking her dog between 3:00 pm and 3:30 pm, when she heard what sounded like a gunshot.

1 June 2018 break-ins

On 1 June 2018, Lee Berryhill ("Berryhill") was on vacation when his neighbor, Sue Bulfin ("Bulfin"), called to inform him that his house had been broken into. The neighbor was retrieving Berryhill's recycling bin from their driveway when she noticed a car in the driveway. Bulfin later described the car as a gray sedan with triangular taillights. Bulfin also observed a black male emerge from the back of the

house, get in the gray sedan and drive away. Bulfin was not able to identify Defendant, but her description of the black male generally comported with the description of Defendant in testimony and witness identifications at trial.

On the same day, Sam Jordan ("Jordan") received a call from his security company that his home alarm had gone off and that law enforcement had been called to investigate. Jordan returned home to find that a propane tank had been thrown through his glass back door. A neighbor, David Hufner ("Hufner"), later called law enforcement to tell them that he had been on a conference call in his home office around 8:00 am when he saw a gray car drive down the street slowly, through the *cul de sac*, then out of the neighborhood. Hufner later determined that the car was likely a four door Chevy Impala, built between 2000 and 2005.

Again, on the same day, another neighbor, Harold Whitson ("Whitson"), noticed an "older black car or dark-colored car, four door sedan" pull into his driveway about 7:30 am. A man emerged and asked Whitson if he needed any yard work done; after Whitson declined, the man "took off." As the car left, Whitson noticed a dent in the center of the hood. At trial, Whitson's description of the man he saw was generally consistent with that of Bulfin. Whitson further testified that the man at his house "certainly resembled" Defendant, but he couldn't say "that's him." Whitson then attempted to make an in-court identification of the man he saw at his house when he pointed toward Defendant but provided a description that did not match Defendant.

Whitson was later permitted to testify that he identified Defendant from a lineup with 90% certainty. The photo line-up was the subject of extensive argument at trial.

Gray sedan

On 5 June 2018, law enforcement attempted to arrest Defendant. They had information that Defendant was at Northgate Mall in Durham. Once at the mall, they found a gray Chevy Impala sedan with temporary license tags, parked in a handicapped space. They watched Defendant and an unnamed woman exit the mall and enter the Impala, but Defendant drove off before local law enforcement could make an arrest. Defendant was still driving this vehicle when he was arrested later that day. This vehicle had a dent in the hood.

II. Joinder

a. Standard of Review

On appeal, this Court reviews a trial court's ruling on a joinder motion for abuse of discretion. *State v. Neal*, 76 N.C. App. 518, 520, 333 S.E.2d 538, 539 (1985).

b. Analysis

Defendant contends that the trial court erred by granting the State's motion to join seventy-three charges for trial in this case. We disagree.

Motions for joinder require a two-part analysis. *State v. Montford*, 137 N.C. App. 495, 498, 529 S.E.2d 247, 250 (2000). The first is that the offense have some transactional connection, and the second is that if such a connection exists,

consideration then must be given as to "whether the accused can receive a fair hearing on more than one charge at the same trial," i.e., whether consolidation "hinders or deprives the accused of his ability to present his defense." *Id*.

When considering whether various offenses have a transaction connection such to constitute a common scheme or plan, the trial court must consider several factors, no one of which is dispositive. *Id*. These factors include: (1) the nature of the offenses charged; (2) any commonality of facts between the offenses; (3) the lapse of time between the offenses; and (4) the unique circumstances of each case. *Id*. at 498-99, 529 S.E.2d at 250.

The facts of this case satisfy all of the above tests. All of the charges were either breaking and entering, or a related charge arising naturally from the unlawful entry, such as larceny of personal property, injury to personal property or unlawful possession of a firearm stolen during the entry. The time between offenses was 75 days. Furthermore, the evidence at trial demonstrated a common scheme or plan to commit the crimes throughout Orange, Alamance and Durham counties. The evidence showed that Defendant would use a rock or similar object to break through a back door, often glass, or kick it in, and proceed directly to the bedrooms. Once in the bedrooms, Defendant limited himself to jewelry, cash and guns, and other highly valuable items. Other evidence shows that Defendant often drove different vehicles to avoid being identified based on the vehicle.

Defendant failed to show that he did not receive a fair hearing on more than one charge at the same trial or that the consolidation deprived him of his ability to present his defense. Defendant chose not to present evidence, so he cannot claim he was deprived of a defense he chose not to make. Furthermore, the trial court dismissed the majority of the charges against Defendant at the close of the State's evidence. Of the charges that resulted in convictions, there were eyewitnesses and/or identifications of the gray Impala sedan. The evidence in those cases, taken in a light most favorable to the State, was sufficient to withstand a motion to dismiss and to support Defendant's convictions.

The trial court properly found that the charges against Defendant constituted a "series of acts or transactions connected together or constituting parts of a single scheme or plan" and Defendant failed to demonstrate any prejudice from joinder of the charges. Defendant cannot show that the trial court abused its discretion by granting the State's motion to join seventy-three charges for trial in this case. Accordingly, the trial court did not err.

III. 404(b)

a. Standard of Review

"Though this Court has not used the term *de novo* to describe its own review of 404(b) evidence, we have consistently engaged in a fact-based inquiry under Rule 404(b) while applying an abuse of discretion standard to the subsequent balancing of

probative value and unfair prejudice under Rule 403. For the purpose of clarity, we now explicitly hold that when analyzing rulings applying Rules 404(b) and 403, we conduct distinct inquiries with different standards of review. When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review *de novo* the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 158-59 (2012).

b. Analysis

Defendant contends that the trial court erred by admitting 404(b) evidence related to break-ins in other counties. We disagree.

"[E]vidence 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. N.C. Gen. Stat. § 8C-1, Rule 404(b) (2014).

In general, 404(b) allows the admission of any evidence, "as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime." *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 158. However, this rule is

"constrained by the requirements of similarity and temporal proximity;" accordingly, while similarities between the charged crime and the 404(b) evidence need not "rise to the level of the unique and bizarre," there must be "some unusual facts present in both crimes that would indicate that the same person committed them." *Id.*

The 404(b) evidence against Defendant was that he had been observed in two different vehicles that were later tied to break-ins in Orange and Alamance counties. One of those vehicles was a gold Mazda, which appeared in a surveillance video taken from a home. The second vehicle was a black Mazda Millenia that was observed on a Ring doorbell camera where one of the break-ins occurred. Furthermore, a Durham County Investigator testified that they had placed GPS trackers on those two vehicles, and the GPS placed those vehicles in the vicinity at the time and place where four Durham County homes were broken into.

The trial court heard this evidence because it fit the same *modus operandi* that Defendant used multiple vehicles during his break-ins to attempt to avoid identification. Evidence of Defendant's proximity to the four Durham County break-ins, much like his proximity to the McKee and Jordan break-ins, demonstrates that Defendant was employing a "plan, scheme, system, or design," rather than having innocently been present in the vicinity of a break-in on at least nine separate occasions.

This evidence is not unfairly prejudicial to Defendant under Rule 403. The evidence is relevant and goes directly to Defendant's guilt. The 404(b) evidence showed a common scheme or plan, and a lack of mistake or accident in Defendant's presence in the vicinity of these repeated break-ins. This evidence was also corroborated by the identification of Defendant at the scheme of the Palmer and McKee break-ins, the identification of his gray Impala and the common method of how each breaking-in occurred. Since Defendant cannot show that the admission of the 404(b) evidence was unfairly prejudicial, we find that the trial court properly admitted the 404(b) evidence.

IV. Motion to Suppress

a. Standard of Review

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . .are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

b. Analysis

Defendant contends that the trial court erred by denying Defendant's motion to suppress Whitson's identification after it became known that police showed Whitson two photographs prior to the photographic lineup. While we agree the line-up conducted here was tainted by the witness being shown a photo of Defendant beforehand, we hold this was not prejudicial error.

A defendant is required to file his motion to suppress evidence prior to trial "unless defendant did not have a reasonable opportunity to make the motion." An untimely motion to suppress may be summarily dismissed by the trial court. *State v. Smith*, 248 N.C. App. 804, 810, 789 S.E.2d 873, 877 (2016).

At issue here is a photograph lineup put together by a law enforcement officer. At trial, the State introduced evidence that the Berryhill's neighbor, Whitson, had encountered a man in his driveway about the time of the Berryhill break-in. While Whitson was not allowed to identify Defendant in open court, he was questioned about a photographic line up prepared by investigators. It became apparent at trial that prior to viewing the photograph lineup, law enforcement showed Whitson a picture of Defendant and told the witness that Defendant had been arrested in connection with break-ins a week earlier. This information was not brought to light before trial, and therefore, Defendant did not have the opportunity to file a motion to suppress prior to trial. Based on this new information, Defendant filed a motion to

suppress at trial. Defendant challenged the procedure of the line-up alleging that it was unduly suggestive, irreparably tainted and inherently unreliable.

The Eyewitness Identification Reform Act (EIRA) governs procedures for law enforcement in conducting live lineups, photo lineups, and show ups. N.C. Gen. Stat. § 15A-284.52 (2019). During any lineup procedure, "no writings or any information concerning any previous arrest, indictment, or conviction of the suspect shall be visible or made known to the eyewitness." N.C. Gen. Stat. § 15A-284.52(b)(7). Show ups, which involve showing a witness only one suspect for purposes of identification, "may only be performed using a live suspect and shall not be conducted with a photograph." N.C. Gen. Stat. § 15A-284.52(c1)(2); *State v. Oliver*, 302 N.C. 28, 44, 274 S.E.2d 183, 194 (1981). A failure to comply with any of the requirements of EIRA "shall be considered by the court in adjudicating motions to suppress eyewitness identification." N.C. Gen. Stat. § 15A-284.52(d)(1).

To determine whether an identification originated with observation of the perpetrator at the time of the offense, the court must review whether the pretrial circumstances surrounding the identification were unnecessarily suggestive, and whether the suggestiveness created a substantial risk of mistaken identity. *State v. Yancey*, 291 N.C. 656, 661, 231 S.E.2d 637, 641 (1977).

Whether there is a substantial likelihood of misidentification depends upon whether "under the totality of the circumstances surrounding the crime itself 'the

identification possesses sufficient aspects of reliability." *State v. Richardson*, 328 N.C. 505, 510, 402 S.E.2d 401, 404 (1991) (quoting *Manson v. Braithwaite*, 432 U.S. 98, 106, 53 L.E.2d 140, 149 (1977)). Our Courts have outlined specific factors to be considered in this evaluation: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. "Against these factors is to be weighed the corrupting effect of the suggestive identification." *State v. Rawls*, 207 N.C. App. 415, 424, 700 S.E.2d 112, 118-119 (2010) (internal citations omitted).

The law enforcement officer told Whitson, "We are making a little progress. We have arrested someone last week. We took charges out on two people for numerous break-ins in the area." The officer then pulled out his phone and showed Whitson an "article" that had been posted on the Sheriff's Office Facebook page "the day before." The article had "pictures of two people . . . side by side." The officer stated that the people were Leron Owens and Andrew Owens. Whitson pointed at the pictures and said, "That looks like him."

Whitsons' description of the man he saw in his yard was a black man, 5'9" or 5'10" tall, with a solid build. The court described this as a "fairly generic description." The encounter was very short, and from 20 feet away. Whitson was also on high

alert at the time of the encounter. Under the totality of the circumstances, the law enforcement officer's conduct was unduly suggestive and tainted the six-photograph lineup. However, while it was error for the court to decline the Motion to Suppress, it did not rise to prejudicial error. Aside from the photo line-up there was overwhelming evidence of Defendant's guilt. Whitson saw Defendant from a short distance, Whitson identified Defendant from a photo line-up with 90% certainty, and the photo line-up took place shortly after the incident.

V. Motion to Dismiss

a. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

b. Analysis

Defendant contends that the trial court erred by denying Defendant's motions to dismiss the charges related to the Palmer, Berryhill, and Jordan break-ins for insufficient evidence that Defendant was the perpetrator. We disagree.

To survive a motion to dismiss, the State must present substantial evidence of (1) each essential element of the charged offense; and (2) that defendant was the perpetrator of the offense. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (1993). Defendant failed to demonstrate which, if any, element was lacking for any offense. As to the Palmer break-in, Defendant contends that the evidence suggested

another person was the perpetrator of the break-in. It is true that there was testimony that a home health aide was aware that the Palmers would be away from the house at the time the break-in was committed, knew the location of the valuables taken, and was originally suspected by Palmer. However, evidence that someone else may had the opportunity or the motive to commit the crimes does not establish which, if any, element of the offense is lacking. Furthermore, the jury was presented with evidence that Defendant's gray sedan was observed in the Palmer driveway.

Similarly, Defendant contends that the evidence shows no more than suspicion that he was the person observed at the Berryhill break-in. The State presented evidence that Defendant's car was found in the Berryhill's driveway at about the time of the break-in and that Whitson observed Defendant in the neighborhood around that time.

Defendant makes the same suspicion argument as to the Jordan break-in. However, the State presented compelling evidence that the break-in matched Defendants *modus operandi*, and there was testimony from Bulfin and Whitson that Defendant was in close proximity at the time of the break-ins. Defendant failed to identify any element that was lacking in any offense, and the State presented evidence of Defendant's presence at the scene of the crime. Accordingly, the trial court did not err in denying Defendant's motion to dismiss.

AFFIRMED.

Judges BRYANT and BROOK concur.

Report per Rule 30(e).