

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1057

Filed: 19 May 2015

Wake County, Nos. 13 CRS 211271, 211273

STATE OF NORTH CAROLINA

v.

PURCELL ORLANDO JONES, JR.

Appeal by defendant from judgments entered 17 April 2014 by Judge Henry W. Hight, Jr., in Wake County Superior Court. Heard in the Court of Appeals 8 April 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General M. Lynne Weaver, for the State.

Adrian M. Lapas for defendant-appellant.

McCULLOUGH, Judge.

Purcell Orlando Jones, Jr., (“defendant”) appeals from judgments entered upon his convictions for two counts of robbery with a dangerous weapon and one count of common-law robbery. For the following reasons, we find no error.

I. Background

On 9 July 2013, a Wake County Grand Jury indicted defendant on one count of first-degree burglary, three counts of robbery with a dangerous weapon, and three counts of first-degree kidnapping in connection with the robbery of a mobile home in

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Knightdale during the early morning hours of 13 May 2013. The case came on for jury trial in Wake County Superior Court before the Honorable Henry W. Hight, Jr., on 14 April 2014.

The evidence at trial tended to show that the mobile home was the home of Brian Jones (“Brian”), his wife Adrienne Jones (“Adrienne”), and his two young children. On the morning of 12 May 2013, Adrienne woke Brian up when two men came to the mobile home to borrow jumper cables. Brian knew one of the men as Millie, later identified by his real name Devaunte Lewis (“Devaunte”), and allowed him to borrow jumper cables. Brian’s friend Sloan Schmitt (“Sloan”), who at the time was asleep on a couch in the mobile home, woke up and noticed the two men but did not recognize either of them.

That day Brian and Sloan hung around the mobile home all afternoon and then began drinking whiskey and beer later in the evening. Brian also smoked marijuana. After the children had gone to bed around seven or eight o’clock and after Adrienne had gone to bed around ten or eleven o’clock, Brian and Sloan stayed up watching a movie on Brian’s computer. Sloan “passed out” during the movie and Brian went to bed once the movie had finished.

Shortly thereafter in the early morning hours of 13 May 2013, Sloan woke up to someone knocking on the door. Sloan testified he could see three figures outside the front door and he opened the door because someone said they had jumper cables

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for Brian. At that instant, the men rushed the mobile home, pushing their way in and pushing Sloan into the bathroom near the front door. Sloan thought three people rushed in, but he was not one hundred percent certain. Sloan testified he was tasered and forced to the bathroom floor, where one of the men held him down. Sloan indicated he fought back initially, but then stopped because he kept getting tasered. Sloan recalled that the men demanded money, but only took his cell phone from the couch where he was sleeping.

Brian testified the next thing he remembered after going to bed was being awakened by someone trying to drag him out of bed. Brian recalled he started to struggle with someone but was then tasered and hit the floor, where he was stomped and punched several times. Brian testified he could tell he was fighting one person and a totally different person came around behind him and tasered him. Brian testified that the men demanded money and took items belonging to him and Adrienne before fleeing the mobile home.

Brian identified defendant as the person punching and stomping him. Brian explained that he knew defendant and Devaunte through Brett Stewart ("Brett"), a friend of Brian's who lived in the mobile home park. Brian indicated he had hung out with defendant on two occasions prior to this incident.

During the commotion, Adrienne was able to escape the mobile home and run to a neighbor's mobile home for help. Both law enforcement and EMS responded.

Brian, Adrienne, and Sloan were all treated for injuries at the scene but refused to go to the hospital.

Detective Alfredo Hicks (“Detective Hicks”) with the Wake County Sheriff’s Office testified that they had been looking for defendant on May 13 and 14 before defendant turned himself in. Defendant initially told Detective Hicks he was turning himself in on a warrant for failure to appear for possession of marijuana and Ecstasy charges and repeatedly denied knowing anything about the robbery of the mobile home. Yet after defendant made a statement including facts about the robbery that the police had not disclosed to defendant, defendant changed his story and told police that he was present at the mobile home during the robbery.

At the close of the State’s evidence, defendant moved to dismiss the charges. The trial court dismissed the two second degree kidnapping charges related to Adrienne and Brian, but allowed the remainder of the charges to go forward.

Defendant then took the stand in his own defense and admitted he was present, but denied knowing anything about the robbery before entering the mobile home. Defendant testified that he spent much of 12 May 2013 drinking and, after midnight, got in his mother’s van with Terrence Williams (“Terrence”) and Devaunte to go home. Terrence drove because defendant had been drinking. Defendant recalled that they stopped and picked up Brett before he dozed off in the front

passenger seat. When defendant woke up, they were at Brian's mobile home. Defendant recalled that Terrence said he was returning jumper cables to Brian.

Defendant testified Terrence and Devaunte approached the mobile home and began knocking on the door. Defendant then turned away and when he looked back, Terrence and Devaunte were gone. At that point, defendant said he approached the mobile home, knocked on the door, and entered. Once inside, defendant heard yelling and saw Brian coming at him. Defendant testified that Brian struck him in the face with a fist and he retaliated. Defendant testified he struggled with Brian in the master bedroom, but was able to kick free of Brian and leave out of the front door. Defendant recalled that he heard Terrence yelling "Where is the money?" during the incident, but defendant did not recall anyone getting tasered.

Defendant later found out from his mother that the police were looking for him and he turned himself in. Defendant stated he initially did not tell the police the truth because he was scared of consequences from Terrence.

Upon deliberation of the evidence, on 17 April 2014, the jury returned verdicts finding defendant not guilty of first degree burglary and second degree kidnapping, but guilty on two counts of robbery with a dangerous weapon and one count of common-law robbery. The trial court entered judgments on defendant's convictions and sentenced defendant to three consecutive terms totaling 160 to 226 months imprisonment. Defendant appeals.

II. Discussion

On appeal, defendant raises the following three issues: whether the trial court erred by (1) admitting evidence of unrelated charges and denying his motion for a mistrial; (2) denying his motion to dismiss one of the counts of robbery with a dangerous weapon; and (3) denying his motion to sequester the alleged victims.

Evidence of Unrelated Charges and Mistrial

At trial, Detective Hicks testified about the investigation and indicated that there were other criminal charges pending against defendant at the time defendant turned himself in to the police on 14 May 2013. Specifically, in response to the State's question, "And what did this [d]efendant tell you at first?" Detective Hicks testified as follows:

I -- I usually start my interviews by asking that person why they think they are there at that time to speak with me. [Defendant] indicated that he was there turning himself in on a warrant for failure to appear for possession of marijuana and Ecstasy charges that were initiated by the Raleigh Police Department.

Upon hearing Detective Hicks' testimony, defendant immediately requested to approach the bench. Following an unrecorded bench conference, the State continued to question Detective Hicks. At the conclusion of the State's direct examination of Detective Hicks, the trial court then excused the jury and defendant objected to Detective Hicks' testimony and moved for a mistrial. In support of his motion,

defendant argued direct evidence of his prior convictions was improperly offered to the jury and was prejudicial.

Upon hearing from both sides, the trial court clarified that Detective Hicks testified defendant said “he was turning himself in for failure to appear on a warrant for possession of marijuana and Ecstasy charges initiated by the Raleigh Police Department[;]” Detective Hicks did not testify defendant “was convicted of anything at all.” The trial court then emphasized that the defense was aware of defendant’s statement to Detective Hicks prior to trial and could have objected sooner. Specifically, the trial court explained the following:

I think the [d]efendant is in a position to have objected earlier if he had desired to do so and failed to do so. And, therefore, the late objection does not provide grounds for a mistrial in this particular case.

Further, that may show the state of mind of the [d]efendant as to the reason that he was with the -- this officer in making his statement.

Despite defendant’s untimely objection, the trial court offered to issue a curative instruction and defendant agreed. The trial court then instructed the jury as follows:

Ladies and gentlemen, the evidence was received before you that this [d]efendant told this officer that he was turning himself in for failure to appear on a warrant for possession of marijuana and Ecstasy charges initiated by the Raleigh Police Department. That evidence is offered solely for the purpose of providing motivation of why the [d]efendant turned himself in to this officer.

It is not proof of any crime. It is not proof that the [d]efendant committed any action in this case at all or the

[d]efendant was guilty of any of the charges against him in this case. It is not evidence that the [d]efendant was, in fact, guilty of any offense at all, most particularly for what may have been in any supposed warrants in this particular case.

And, therefore, I tell you to disregard that information completely in your determination in this case of -- of determining whether the [d]efendant was guilty of -- or innocent of any of the charges facing him at this time.

Defendant then proceeded to cross-examine Detective Hicks.

Now on appeal, defendant contends the trial court erred in admitting Detective Hicks' testimony that defendant turned himself in on unrelated charges and erred in denying his motion for a mistrial because the challenged testimony was irrelevant and unduly prejudicial to his case.

"Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893, *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001). "The admissibility of evidence is governed by a threshold inquiry into its relevance. In order to be relevant, the evidence must have a logical tendency to prove any fact that is of consequence in the case being litigated." *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (citation and internal quotation marks omitted), *appeal dismissed and disc. review denied*, 351 N.C. 644, 543 S.E.2d 877 (2000).

Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal. Because

the trial court is better situated to evaluate whether a particular piece of evidence tends to make the existence of a fact of consequence more or less probable, the appropriate standard of review for a trial court's ruling on relevancy pursuant to Rule 401 is not as deferential as the "abuse of discretion" standard which applies to rulings made pursuant to Rule 403.

Dunn v. Custer, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citation and quotation marks omitted). "Furthermore, a [m]istrial is a drastic remedy, warranted only for such serious improprieties as would make it impossible to attain a fair and impartial verdict. . . . Our standard of review when examining a trial court's denial of a motion for mistrial is abuse of discretion." *State v. Dye*, 207 N.C. App. 473, 481-82, 700 S.E.2d 135, 140 (2010) (citations and internal quotation marks omitted).

Although we agree Detective Hicks' testimony that defendant turned himself in on unrelated drug possession charges was irrelevant to the charges in the present case, defendant failed to preserve the issue concerning the admission of the evidence for appeal. "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1) (2015). In this case, defendant did not object until the State had completed its direct examination of Detective Hicks. As indicated by the trial court, defendant could have objected sooner. The defense was aware of the defendant's statement to Detective Hicks and should have objected immediately upon Detective Hicks testifying about defendant's

statement. Instead, defendant waited until the State concluded its direct examination of Detective Hicks and the trial court excused the jury. This objection was untimely.

In a footnote, defendant suggests that he objected during the unrecorded bench conference immediately following Detective Hicks' statement but the trial court waited until a more reasonable time to allow defendant to more thoroughly voice his objection. Upon review of the record, we are not convinced and we will not assume that such objection was made during the unrecorded bench conference when, in addressing defendant's objection and motion for a mistrial at the conclusion of the State's direct examination of Detective Hicks, the trial court made clear that "[d]efendant [was] in a position to have objected earlier if he had desired to do so[.]" adding "the late objection does not provide grounds for a mistrial in this particular case."

Moreover, even if defendant offered a timely objection to Detective Hicks' testimony, the admission of the evidence did not prejudice defendant's case. The trial court's thorough curative instruction limited the jury's consideration of the evidence to explain why defendant turned himself into police and eliminated any prejudice that could have resulted from Detective Hicks' testimony. Additionally, during the State's cross-examination of defendant, defendant testified about his prior drug convictions and offered testimony almost identical to the challenged testimony when

he confirmed that “[he] thought that [he was] there because [he was] turning [him]self in on a failure to appear in court for possession of Ecstasy and marijuana[.]”

Given that defendant failed to timely object to Detective Hicks’ testimony and given that any prejudice resulting from the testimony was eliminated by the trial court’s curative instruction and defendant’s own testimony at trial, we hold the trial court did not abuse its discretion in denying defendant’s motion for a mistrial.

Motion to Dismiss

Both at the close of the State’s evidence and at the close of all the evidence, defendant moved to dismiss all the charges against him. With the exception of the two counts of second degree kidnapping related to Adrienne and Brian, which the trial court dismissed at the conclusion of the State’s evidence, the trial court allowed all the charges to go to the jury.

In this second issue on appeal, defendant now contends the trial court erred in failing to dismiss the robbery with a dangerous weapon charge related to Adrienne.

“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). “ ‘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,

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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). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). “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).

Pertinent to this issue on appeal, we note that the jury found defendant guilty of common-law robbery of Adrienne, a lesser included offense of robbery with a dangerous weapon. Because defendant was found not guilty of robbery with a dangerous weapon of Adrienne and was convicted of the lesser included offense of common-law robbery, we address defendant’s arguments as they relate to the lesser included offense.

“To withstand a motion to dismiss a common-law robbery charge, the State must offer substantial evidence that the defendant feloniously took money or goods of any value from the person of another, or in the presence of that person, against that person’s will, by violence or putting the person in fear.” *State v. Davis*, 325 N.C. 607, 630, 386 S.E.2d 418, 430 (1989). While reviewing a defendant’s convictions for

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robbery with a dangerous weapon in *State v. Tuck*, this Court recognized that “ [t]he word “presence” . . . must be interpreted broadly and with due consideration to the main element of the crime – intimidation or force’ ” 173 N.C. App. 61, 67, 618 S.E.2d 265, 270 (2005) (quoting *State v. Clemmons*, 35 N.C. App. 192, 196, 241 S.E.2d 116, 118-19 (1978)). Thus, where the evidence in *Tuck* tended to show that the defendant entered a store, pointed a gun at a store employee causing the store employee to flee the store, and then took money from the store’s cash register, this Court concluded “that the State produced sufficient evidence from which the jury could find that [the] defendant took property from [a store employee’s] person or in her presence, despite [the store employee’s] flight during the incident.” *Id.* at 68, 618 S.E.2d at 271.

We find no reason “presence” should be interpreted differently in this case for common-law robbery, a lesser included offense of robbery with a dangerous weapon.

In support of his argument that the trial court erred in denying his motion to dismiss the robbery with a dangerous weapon charge and lesser included offenses related to Adrienne, defendant contends “no evidence was presented that Adrienne Jones was intimidated, threatened[,] or assaulted in order to deprive her of any property[]” because Adrienne did not testify and neither Brian nor Sloan testified about why, how, or when Adrienne fled the mobile home or whether there was any

force or intimidation involved. Therefore, defendant contends the evidence was insufficient as a matter of law. We disagree.

Evidence in this case tended to show that Adrienne lived at the mobile home with Brian and their two young children at the time of the robbery. Brian, Adrienne, and their youngest child slept in the master bedroom and their other child slept in a second bedroom. The night of the robbery, Adrienne went to bed around eleven o'clock while Brian and Sloan were up watching a movie. The children had gone to bed earlier. Later that night when the movie was finished and after Sloan had "passed out" on the couch, Brian went to sleep in the master bedroom where Adrienne and their youngest child were already asleep. The next thing Brian remembered was waking up to someone dragging him out of bed in the middle of the night. Although Brian could not see exactly what was going on with Adrienne as he was being beaten and tasered by the intruders, Brian recalled hearing Adrienne screaming in the hallway. Sloan also testified that, while one of the intruders was on top of him in the bathroom, he heard yelling from the other side of the mobile home where Brian and Adrienne were. By the time the intruders fled and Brian and Sloan were able to gather themselves, Adrienne was outside yelling. Brian testified "[Adrienne] was running around outside the neighborhood screaming." She was trying to get help, "going from door to door knocking, holding the baby." Both Brian and Sloan testified that Adrienne had a busted lip. Brian further explained that "they had punched her,

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and her teeth had gone into her lips. And she had a -- a gash right there (indicating) on her.” The State then introduced exhibits 36 and 37 into evidence, which Brian stated showed damage to Adrienne’s face that she did not have prior to the incident. Wake County Sheriff’s Deputy M. D. Reitman, who responded to the robbery that night, also testified about the injuries sustained by the alleged victims. Concerning Adrienne, Deputy Reitman testified that “she was also beaten very badly. Her mouth was -- she had several lacerations on his [sic] her mouth. She had blood all over her face. It looked like somebody had drawn all over her mouth with lipstick.” In addition to items belonging to Brian and Sloan, the evidence further revealed that a Louis Vuitton wallet, a Dooney & Bourke purse, and a cell phone belonging to Adrienne were taken from on, in, or near a nightstand next to the bed where Adrienne slept.

Viewing this evidence in the light most favorable to the State, we hold there was substantial evidence to support the charge of common-law robbery of Adrienne Jones. The evidence was sufficient to support a conclusion that Adrienne fled the mobile home as a result of violence or fear and items were taken from her presence upon her fleeing to find help. Accordingly, the trial court did not err in denying defendant’s motion to dismiss.

Motion to Sequester

Upon the State’s first witness being called and sworn, defendant requested to sequester the alleged victims. The trial court summarily denied defendant’s request

and allowed the State to continue with its first witness. In this last issue on appeal, defendant contends the trial court's summary denial of his request to sequester the alleged victims without inquiry was error.

N.C. Gen. Stat. § 15A-1225 provides that “[u]pon motion of a party the judge may order all or some of the witnesses other than the defendant to remain outside of the courtroom until called to testify” N.C. Gen. Stat. § 15A-1225 (2013), *see also* N.C. Gen. Stat. § 8C-1, Rule 615 (“At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion.”). Recognizing that the statute states the judge “may” order sequestration, our courts have long held that

“‘[a] 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 [action] was so arbitrary that it could not have been the result of a reasoned decision.’”

State v. Roache, 358 N.C. 243, 276-77, 595 S.E.2d 381, 404 (2004) (quoting *State v. Hyde*, 352 N.C. 37, 43, 530 S.E.2d 281, 286 (2000), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001) (quoting *State v. Call*, 349 N.C. 382, 400, 508 S.E.2d 496, 507-08 (1998))).

When making his request to sequester in this case, defendant did not give a specific reason for sequestration and did not attempt to argue his position. Nevertheless, defendant now contends the trial court’s denial could not have been the result of a reasoned decision because no inquiry was made. We disagree.

Although “ ‘[t]he [better] practice should be to sequester witnesses on request of either party unless some reason exists not to[,]’ ” *State v. Sprouse*, 217 N.C. App. 230, 238, 719 S.E.2d 234, 241 (2011) (quoting *State v. Anthony*, 354 N.C. 372, 396, 555 S.E.2d 557, 575 (2001) (alterations in original) (internal quotation marks and citation omitted)), we hold the trial court did not abuse its discretion in denying defendant’s request to sequester in this case where defendant did not provide a basis for his request. *See State v. Sparrow*, 276 N.C. 499, 511, 173 S.E.2d 897, 905 (1970) (holding a defendant’s argument meritless where the “record discloses no reason for sequestration of the witnesses, and no abuse of discretion has been shown.”).

Moreover, defendant has failed to show prejudice as a result of the trial court’s denial of his request to sequester the alleged victims. Defendant points to two instances where he claims Brian tailored his testimony to Sloan’s testimony, resulting in prejudice. First, defendant points to Sloan’s testimony that “[he and Brian] were drinking and [he] passed out on the couch[]” and claims that Brian tailored his subsequent testimony to show Sloan did not pass out drunk, but “just went and laid down. . . . [J]ust that he was ready for bed.” Defendant contends Brian’s testimony prejudiced his case because “[a] true description of Sloan’s state of intoxication, that is ‘passed out,’ would have necessarily impacted the jury’s consideration of Sloan’s description of what happened.” Second, defendant points to Sloan’s testimony that one of the intruders wanted money and claims that Brian

tailored his testimony to be consistent when he testified he heard an intruder ask, “Where is the money?”

Upon review of the record, we are not convinced that Brian tailored his testimony in either instance; nor was defendant prejudiced.

In regard to the first instance, although Sloan testified he was drinking, Sloan did not specify how much he had to drink, that he was intoxicated, or that he passed out from intoxication. Sloan merely stated he “passed out.” Like Sloan, Brian also initially testified that “[he thought] Sloan passed out before I did, if I remember correctly.” It was not until a follow-up question that Brian clarified that Sloan just went and laid down because he was ready for bed. Upon review of the testimony, we cannot say that Brian’s testimony did not give an accurate impression of Sloan’s condition. In fact, an agent from the Wake County CCBI who investigated the incident indicated Sloan did not appear intoxicated, stating it did not appear to him that Sloan had been drinking. Moreover, the jury heard the evidence that Sloan and Brian were drinking and heard Brian’s own testimony that “I wasn’t sober, but I wasn’t drunk.” It was within the province of the jury to weigh the credibility of the witnesses. *See State v. Taylor*, _ N.C. App. __, __, 767 S.E.2d 585, 589 (2014) (“It is fundamental to a fair trial that the credibility of the witnesses be determined by the jury.”) (citation omitted).

Concerning the second instance, there is no indication that from Brian's testimony that the intruders wanted money was a reflection of Sloan's prior testimony. The fact that Brian's testimony was consistent with Sloan's does not prove it was tailored. Contrary to defendant's assertion, a review of the record shows that Brian's testimony at trial was consistent with a witness statement he provided to police on 13 May 2013. At trial, Brian was asked to read the witness statement in which he told police "I was woken up to a black guy fighting me. While fighting back, I heard someone asking 'Where is your money at?' " Moreover, there can be no prejudice where even defendant testified that he heard Terrence ask, "Where is the money?"

Because defendant has not shown that Brian altered his testimony and has not shown prejudice, we hold the trial court did not abuse its discretion.

III. Conclusion

For the reasons discussed, we hold defendant received a fair trial free of prejudicial error.

NO ERROR.

Judges STEELMAN and STEPHENS concur.