NO. COA10-1568
NORTH CAROLINA COURT OF APPEALS

Filed: 6 September 2011

STATE OF NORTH CAROLINA,

v. Mecklenburg County
No. 08CRS245726, 245728

ANDREW JASPER FULTON,
Defendant.

Appeal by defendant from judgments entered 30 June 2010 by Judge Nathaniel J. Poovey in Superior Court, Mecklenburg County. Heard in the Court of Appeals 25 May 2011.

Attorney General Roy A. Cooper III, by Assistant Attorney General Brian R. Berman, for the State.

Jon W. Myers, for defendant-appellant.

STROUD, Judge.

Defendant appeals his convictions for felonious breaking or entering and larceny after breaking or entering. For the following reasons, we find no error.

I. Background

On 8 September 2008, at approximately 12:45 p.m., Ms. Guss was in her home when a black male knocked on her door. Ms. Guss opened the door and saw a van parked outside her house with

"another black person" sitting in the front passenger seat. The man at Ms. Guss's door asked for "Christine or Christina[;]" Ms. Guss informed him that no one by that name lived at her home. The man at her door then left, got into the van, and drove into a cul-de-sac. When Ms. Guss did not see the van leave the cul-de-sac, she got in her car and drove to the cul-de-sac, only to find the police who had been called to Mr. Ronald Culpepper's house via his home alarm system. The back door of Mr. Culpepper's home had been broken into and his television had been stolen. Later, around 2:00 p.m., Officers Brian Wakeland and Douglas Straub of the Charlotte Mecklenburg Police Department pulled over a van because the van had been reported as stolen. Defendant was the passenger in the van wherein Mr. Culpepper's television was found.

On 13 October 2008, defendant was indicted for felonious breaking or entering ("breaking or entering"), larceny after breaking or entering ("larceny"), and felonious possession of stolen goods. Defendant was tried, and the jury found defendant guilty of all of the charges against him. The trial court entered judgment on defendant's convictions, and he appeals.

II. Motion to Dismiss

Here, the trial court instructed the jury on two different theories upon which defendant may be convicted, acting in concert and the doctrine of recent possession. Defendant contends that the trial court erred in denying his motion to dismiss the charges for breaking or entering and larceny because there was insufficient evidence of acting in concert, but defendant's brief does not address the doctrine of recent possession.[1] As the jury could have convicted defendant of breaking and entering and larceny via the doctrine of recent possession, *see State v. Milligan*, 192 N.C. App. 677, 682, 666 S.E.2d 183, 187 (2008) ("In cases of breaking or entering and larceny, the doctrine of recent possession can be applied when it is shown that stolen property was found in the defendant's possession soon after it was stolen and under circumstances that make it unlikely that the defendant obtained possession honestly."), and as defendant did not challenge this theory, we need not address defendant's argument regarding acting in concert.

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[1] While the heading of defendant's first argument also purports to be challenging his conviction for possession of stolen goods, defendant makes no argument regarding this conviction and the notice of appeal does not list the possession of stolen goods judgment. Furthermore, judgment was arrested as to defendant's conviction for possession of stolen goods. Therefore, we will only address defendant's convictions for breaking or entering and larceny.

III. Indictment

Defendant also contends that his indictment for breaking or entering is fatally defective because it does not allege consent, which is an essential element of breaking or entering.

> Whether an indictment is fatally defective is a question of law reviewed by this Court *de novo*. It is well-settled that the failure of a criminal pleading to charge the essential elements of the stated offense is an error of law which may be corrected upon appellate review even though no corresponding objection, exception or motion was made in the trial division.

State v. De la Sancha Cobos, ___ N.C. App. ___, ___, 711 S.E.2d 464, 467-68 (2011) (citations, quotation marks, and brackets omitted).

However, defendant acknowledges in his brief that

> this Court has held that the element of lack of consent is implicit in the allegation that a breaking and entering was done "unlawfully" and "feloniously". *State v. Pennell*, 54 N.C. App. 252, 259-260, 283 S.E.2d 397, 401 (1981), *rev. denied*, 304 N.C. 732, 288 S.E.2d 804 (1982).
>
> Mr. Fulton respectfully requests that this Court reconsider the indictment issue as other legal sources clearly indicate that lack of consent is an essential element of the crime of breaking and entering.

Defendant then directs this Court's attention to the North Carolina Pattern Jury Instructions, the trial court's charge to the jury, and "the North Carolina Crimes book published by the

School of Government[.]"

"Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). As this Court has previously determined that the State need not explicitly state that defendant did not have consent for an indictment for breaking or entering to be valid, we overrule this argument as defendant's indictment alleged he "unlawfully and willfully did feloniously break and enter a building[.]" *See State v. Pennell*, 54 N.C. App. 252, 260, 283 S.E.2d 397, 402 (1981) ("We further agree with the State's contention that the language in the indictment, that the defendant 'unlawfully and wilfully did feloniously break and enter a building of Forsyth Technical Institute, belonging to the Board of Trustees,' implies that defendant did not have the consent of the Board of Trustees."), *disc. review denied and appeal dismissed*, 304 N.C. 732, 288 S.E.2d 804 (1982).

IV. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

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

Report per Rule 30(e).