IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 16-708

Filed: 21 February 2017

Orange County, Nos. 14 CRS 50404, 50423-24, 50426, 14 CRS 00169, 15 CRS 00124

STATE OF NORTH CAROLINA

v.

BRIAN JOSHUA BAKER

Appeal by Defendant from judgments entered 2 November 2015 by Judge Paul C. Ridgeway in Superior Court, Orange County. Heard in the Court of Appeals 30 November 2016.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General M. Lynne Weaver, for the State.*

*Sarah Holladay for Defendant.*

McGEE, Chief Judge.

Brian Joshua Baker ("Defendant") appeals his convictions for felonious breaking and entering (three counts); larceny after breaking and entering (two counts); safecracking (two counts); possession of housebreaking tools (two counts); misdemeanor breaking into coin/currency operated machines (three counts); and injury to real property. We find no error.

## I. Background

Defendant was charged in connection with three separate incidents, and all charges were joined for trial. At trial, the State's evidence tended to show the following:

Hot Tin Roof Incident

Mark Bateman ("Bateman"), owner of the Hot Tin Roof bar ("Hot Tin Roof" or "the bar") in Hillsborough, arrived at work on 27 January 2014 to discover the bar had been burglarized sometime after he had locked up around 6:00 or 6:30 p.m. the previous evening. Although the door was still locked, he "knew something was up" when he "opened the door, [and] the [bar's security] alarm didn't go off." Bateman found that his office had been "completely torn apart." The bar's ATM machine, juke box, and several video game machines had been broken into and money was missing from each. Additionally, money and a handgun were missing from a safe located in Bateman's office. Bateman called the Hillsborough Police Department ("HPD"). Responding officers found that the bar's back door had been pried open, the bar's security system had been disabled, and all telephone and cable wires had been cut. Officers also observed yellow paint and tool marks on Bateman's safe, the ATM, and parts of the video game machines.

The bar's security camera system was not disabled during the burglary, and there was video footage of the burglar in the bar the previous night while the bar was closed. The footage showed the burglar breaking into the cash register and

dismantling a video game machine. The burglar appeared to be wearing a sweatshirt or hoodie and some type of bandanna or scarf over his face. The burglar also appeared to be wearing gloves, carrying a backpack, and holding bolt cutters and a flashlight. At trial, the State introduced still shots of security footage that showed Defendant at the bar at approximately 2:46 a.m. on 26 January 2014, while the business was open, "standing at the edge of the bar talking to a[nother] patron" and "watching . . . how [Hot Tin Roof employees] worked."

Torero's Incident

Officers from the Chatham County Sheriff's Office ("CCSO") responded to a reported burglary at Torero's Mexican restaurant ("Torero's") in Chapel Hill[1] at approximately 10:00 a.m. on 29 January 2014. The restaurant's door had been breached, and officers noticed "there was some yellow paint [on the door] that was transferred from some sort of tool." Inside Torero's, electrical wires had been ripped from the ceiling and cut, disabling the alarm system. Around $12,000.00 or $13,000.00 was missing from an unlocked safe located in the office of Torero's owner, Gabino Ornelas ("Ornelas"). A Toshiba laptop computer was also missing from Ornelas's office.

Although much of Torero's video security system was damaged during the break-in, investigators were "able to view . . . a small segment of what happened that

[1] Although Torero's was technically located in Chatham County, "a few miles from the Orange County/Chatham County line[,]" it had a Chapel Hill address.

night [during the burglary]." The recovered footage showed an individual enter Torero's at approximately 3:40 a.m. on 29 January 2014 through "the side door[,] wearing dark clothes [and] carrying a black backpack and . . . tak[ing] approximately [ten] minutes to gain entry . . . ; at times, retrieving different tools from the backpack." The burglar "stayed around the perimeter of the inside of the restaurant to avoid any further inside cameras seeing what he was doing." The security cameras stopped filming once the wires were cut in Ornelas's office.

El Patron Incident[2]

Durham police responded to a reported burglary at El Patron Mexican restaurant ("El Patron") in Durham on the morning of 11 February 2014. Investigating officers discovered a burglar had entered through El Patron's side door, which showed pry marks. Wires to El Patron's security camera on the back of the building had been cut, "and there appeared to be other wires cut and other electrical and computer boxes that were moved inside the building." Inside the restaurant, a safe had been damaged and the cash register drawer was open. In addition to "a little bit of cash[,]" a Gateway laptop was missing from the office of El Patron owner Juan Gomez Hernandez ("Hernandez").

Pueblo Viejo Incident

[2] Defendant was not charged or tried in connection with the El Patron incident, but the State offered evidence related to this break-in at Defendant's trial, as discussed later in this opinion.

HPD Officer Timothy Corbett ("Officer Corbett") was on patrol during the early morning hours of 18 February 2014 when he was dispatched to the Pueblo Viejo Mexican restaurant ("Pueblo Viejo") in Hillsborough around 4:00 a.m. Pueblo Viejo's security alarm system had been activated. When Officer Corbett received the dispatch, he happened to be parked about one hundred yards from Pueblo Viejo. Upon driving to the front of the restaurant, Officer Corbett saw "two people coming out of [Pueblo Viejo] dressed in all black. . . . They were running out the side door up the hill [behind the restaurant][.]" Officer Corbett drove to the top of the hill and parked his vehicle in front of a green Ford Explorer ("the Explorer"). Officer Corbett noticed "two guys standing at the back of the [Explorer], and immediately . . . challenged [them] to stop." The two individuals ran behind Officer Corbett, who pursued them on foot. Officer Corbett testified that

> it was two males, one whi[t]e male, one black male. The white male, he had a plastic gun in his waistband with a security shirt on and the black male, he was dressed in all black. And [the black male] stopped running, . . . so I ordered him to the ground. I tried to challenge the [white] male to . . . stop running.

The white male continued running. Officer Corbett called for police backup and "gave a description of the subject that was running and the direction that he was running[.]"

After handcuffing the individual who had stopped running, Officer Corbett ran the Explorer's vehicle identification number, which identified Defendant as the vehicle's owner. Officer Corbett also ran the Explorer's license plate tags, finding

they were fictitious New York tags registered to a BMW. Officers found a yellow pry bar on the ground behind the Explorer. There was also a black bag nearby that contained a second yellow pry bar, bolt cutters, multiple flashlights, a "spring-loaded . . . grabber tool[,]" and a police scanner set to the frequencies of a number of area police departments, including the Hillsborough Police Department, the Chapel Hill Police Department, the Durham Police Department, and the Chatham County Sheriff's Office. Inside the Explorer, officers found a wallet with Defendant's driver's license; a black jacket and pair of gloves; pawn tickets in Defendant's name; a flashlight; a large black pry bar on the floor in the backseat; a name badge for Pueblo Viejo; a DVR system with a keyboard with its wires cut; and the Explorer's correct license plate and registration. The Explorer was registered to an address located on Old N.C. Highway 10 in Hillsborough.

Other investigating officers found pry marks on Pueblo Viejo's rear door, and the deadbolt lock was broken. Inside the restaurant, "[a]ll the wires, cable, any kind of power lines, [and] wires . . . were cut." An alarm panel had been pulled off the wall. The cash register drawer was open, but nothing appeared to be missing. A safe located beneath the cash register did not appear to have been tampered with.

Investigator Troy Williams ("Investigator Williams") of the Orange County Sheriff's Office was on patrol duty in the early morning hours of 18 February 2014 when he received information about the Pueblo Viejo break-in and the current effort

to locate a person of interest. While driving on Interstate 85, at approximately 4:30 a.m., Investigator Williams observed an individual walking near the fog line on the side of the road. Although there was ice and snow on the ground, the individual was wearing a short sleeve t-shirt and his skin was noticeably red. Investigator Williams "pulled off to the right side of the fog line . . . [and] exited [his] vehicle. [He] instructed the subject . . . to stop where he was, [to show] his hands." The subject "made a couple of hand gestures, looked towards the wood line and took off in[to] the woods."

Law enforcement officers expanded their search on foot and eventually tracked Defendant to Byrdsville Mobile Home Park in Hillsborough, approximately four hundred yards from the home of Defendant's mother, Deborah Vanduzee ("Ms. Vanduzee"), located on Old N.C. Highway 10. Defendant was dirty from the waist down and appeared out of breath. He was carrying a pocket knife and a wallet with a security badge in it. Defendant was handcuffed and transported to the Hillsborough police station for questioning. Defendant told police "he had been staying in a hotel room . . . paid for by his mother." Defendant was released after the interrogation.

Investigator Steven Slagle ("Investigator Slagle") of the Chapel Hill Police Department was present during the interview with Defendant. After the interview concluded, Investigator Slagle went to the home of Ms. Vanduzee, located at 1817 Old N.C. Highway 10. Two vehicles were parked in the driveway. One of the vehicles was a green Ford Explorer with a license plate number different from the one

belonging to the Explorer seen at Pueblo Viejo. Ms. Vanduzee told Investigator Slagle that Defendant was staying at an Extended Stay motel ("the motel") located at 1920 Ivy Creek Boulevard in Durham. Based on that information, Investigator Slagle went to the motel and "checked with the employees to try to get some information [and] to see if anybody recognized [Defendant]." Investigator Slagle also checked dumpsters around the motel for discarded electronics. After returning to his vehicle, Investigator Slagle saw Defendant "[come] out of the bushes [near the motel] . . . [and] walk[] up to the second story of the building . . . [and] eventually [go] into a room[.]" Investigator Slagle also saw "the [green] Ford [E]xplorer [that had been parked in Ms. Vanduzee's driveway] . . . parked off the [motel] property across the street in another parking lot."

The following day, 19 February 2014, Investigator Slagle received a call reporting that Ms. Vanduzee was at the motel and was removing items from Room 376. Investigator Slagle, along with Investigator Bobby Crabtree ("Investigator Crabtree") of the Durham Police Department, returned to the motel. Motel employees directed the officers to some trash cans in an outside stairwell underneath Room 376, in which the officers found video recording devices and other electronics with serial numbers "scratched off or removed;" computer components that were "smashed, damaged, and scratched;" mail addressed to Defendant at Ms. Vanduzee's address;

gloves; receipts showing Defendant's name; an insurance card with Defendant's name on it; and a stethoscope.

As investigating officers approached Room 376, they saw Ms. Vanduzee inside the room holding a cardboard box with some tools in it. Officers asked her to leave the room, and Investigator Crabtree obtained a warrant to search the motel room. Inside the motel room, officers found the Toshiba laptop that had been stolen from Torero's on 29 January 2014 and the Gateway laptop that had been stolen from El Patron on 11 February 2014. They also found a Picasso Pawn ticket for a laptop computer. Investigator Crabtree contacted CCSO Investigator Chris Burger ("Investigator Burger"), who had investigated the Torero's burglary, and informed him that the recovered Toshiba laptop had the same serial number as the laptop stolen from Torero's.

Investigator Burger brought Defendant in for questioning in connection with the Torero's break-in on 18 March 2014. Prior to questioning, Defendant signed a Sixth Amendment Rights Waiver. Investigator Burger testified:

> Once we stepped out of [the examination room], . . . [Defendant] said . . . "[r]emember the two – two things I told you." And I responded immediately with, "[w]hat; that you did it?" [Defendant said], "Yes, and I did it alone."

Defendant was indicted on charges of (1) felonious breaking and entering, safecracking (two counts), possession of burglary tools, larceny after breaking and entering, breaking into a coin/currency machine (three counts), and injury to real

property, in the 27 January 2014 Hot Tin Roof break-in; (2) felonious breaking and entering and felonious larceny, in the 29 January 2014 Torero's break-in; (3) felonious breaking and entering and felonious possession of burglary tools, in the 18 February 2014 break-in at Pueblo Viejo; (4) attaining the status of an habitual felon; and (5) habitual breaking and entering.

The trial court granted the State's motion to join all charges for trial. Defendant did not present evidence at trial. A jury convicted Defendant on all charges. Defendant stipulated to the charge of attaining the status of an habitual felon, and the State dismissed the charge of habitual breaking and entering. Defendant was sentenced to consecutive sentences totaling 236 to 320 months' imprisonment. Defendant gave oral notice of appeal in open court.

## II. Motions to Remove Appointed Counsel

In his first argument on appeal, Defendant contends the trial court erred by denying his motions to remove appointed counsel. This argument is without merit.

### A. Standard of Review

"The decision to substitute counsel rests solely in the discretion of the trial court." *State v. Morgan*, 359 N.C. 131, 146, 604 S.E.2d 886, 895 (2004) (citation omitted). In the absence of an alleged constitutional violation, this Court reviews the denial of a defendant's request to remove appointed counsel for an abuse of discretion. *See State v. Sweezy*, 291 N.C. 366, 371-72, 230 S.E.2d 524, 529 (1976). "A trial court's

actions constitute abuse of discretion upon a showing that [the] actions are manifestly unsupported by reason and so arbitrary that [they] could not have been the result of a reasoned decision." *State v. Williams*, 361 N.C. 78, 81, 637 S.E.2d 523, 525 (2006) (citation and internal quotation marks omitted) (alterations in original). Even when an abuse of discretion occurs, a defendant is entitled to a new trial only upon demonstrating the error resulted in prejudice. *See State v. Skipper*, 146 N.C. App. 532, 537, 553 S.E.2d 690, 693-94 (2001). "In order to establish prejudicial error arising from the trial court's denial of a motion to withdraw [or a request to remove appointed counsel], a defendant must show that he received ineffective assistance of counsel." *State v. Thomas*, 350 N.C. 315, 328, 514 S.E.2d 486, 495 (1999); *see also State v. Anderson*, 350 N.C. 152, 164-68, 513 S.E.2d 296, 304-06 (1999).

B. Analysis

1. Defendant's First Motion to Remove Appointed Counsel

Two appointed attorneys were allowed to withdraw from representing Defendant, on 16 December 2014 and 30 April 2015, respectively, due to conflicts of interest. A third trial counsel ("Counsel") was appointed to represent Defendant on 30 April 2015. Defendant filed a "Motion to Terminate Appointed Counsel" on 3 August 2015. In an affidavit accompanying that motion, Defendant alleged Counsel had violated the Rules of Professional Conduct by, *inter alia*, discussing confidential details about Defendant's case with Ms. Vanduzee; inadequately preparing to

represent Defendant at trial; and failing to communicate with Defendant. Defendant also indicated he had filed a formal complaint against Counsel with the North Carolina State Bar ("the State Bar" or "the Bar"). Counsel filed a Motion to Withdraw on 18 August 2015, asserting that, since his appointment to Defendant's case, he had "investigated all aspects of [Defendant's case], researched the relevant law and statutes, and appeared in [c]ourt on behalf of . . . Defendant" and that he had "communicated with Defendant in person." Although Counsel characterized Defendant's claims as "meritless," he contended "[his] relationship . . . with [] Defendant ha[d] been irretrievably broken to the extent that [he could not] continue his representation."

Judge R. Allen Baddour, who appointed Counsel to represent Defendant, heard the motions on 19 August 2015. Counsel told the court it was "clear that [Defendant] ha[d] lost confidence in [Counsel's] ability to represent him" and that, based on the allegations in Defendant's motion to terminate, "it just would not be possible for [Counsel] to continue to represent him." After hearing from Counsel, the trial court asked Defendant: "What would you like for the [c]ourt to know?" Defendant told the court:

> I just – you know, it was certain issues with me and [Counsel] that . . . I felt . . . went against the client/lawyer relationship and [I] didn't feel confident with going to trial. . . . [Counsel] had just got on the case a couple of months ago. . . . And it's not like I'm trying to run through lawyers here, but I just didn't feel confident with [Counsel]:

> number one, because he hadn't been on the case that long, hadn't had a chance to look at anything; and then when we did speak, he didn't have really too much knowledge about the situation. I feel that [Counsel is] a smart man. I just feel that we weren't on the same page and he wasn't – there was reasonable attempts to receive information that he just didn't do and that . . . was detrimental to my case. . . . I don't have anything against [Counsel], . . . [but] I need somebody that's going to go to bat for me.

After hearing from Defendant, the trial court responded:

> All right. I think what you need to do is just take a step back and figure out how best to handle your case with [Counsel]. Okay? I don't think it's going to help to appoint another lawyer. [Counsel is] a competent, excellent lawyer[.] . . . There's no reason – there's nothing you've told me that he can't address.

The trial court denied both motions.

2. Defendant's Second Motion to Remove Appointed Counsel

Defendant filed a "Motion to Dismiss Court Appointed Counsel" on 21 October 2015, citing a loss of confidence in Counsel's abilities and asserting an intent to hire private counsel. Judge Paul C. Ridgeway heard Defendant's motion during pretrial proceedings on 26 October 2015. When given an opportunity to speak, Defendant told the court that Counsel had been "extremely, extremely rude" to him and called him "stupid." Defendant contended Counsel had denied requests from Defendant to examine evidence relevant to Defendant's case, and had refused to share with the District Attorney's office information Defendant had about another person being tried for murder. Defendant alleged "[t]here ha[d] been several different violations . . . of

the client-attorney privilege relationship[.]" Defendant further indicated he had "filed [a complaint] with the [North Carolina] State Bar against [Counsel]." Defendant also contended Counsel had refused to file a motion to suppress certain evidence.

The trial court made further inquiry into the complaint Defendant alleged he had filed with the State Bar. Defendant provided partial documentation of his correspondence with the State Bar, but did not have copies of any of their responses regarding the status of his complaint. Counsel told the court he had contacted the Bar to inquire whether he could continue representing a client when there was a pending complaint against him, and that "the nonlawyer that [he] spoke with . . . indicated . . . that they had received . . . a complaint against [him]; but that since it . . . seemed to allege ineffective assistance of counsel, that [the State Bar's] general policy appears to be not to open a grievance." The trial court also asked whether the State "ha[d] any information . . . on this State Bar [complaint] status[.]" The State had no information for the court. Counsel told the court he was "prepared for trial" and "ready to proceed."

The trial court took a recess to consider the matter, and Judge Ridgeway contacted the State Bar "to inquire about the status of this grievance that [Defendant] ha[d] filed[.]" Upon returning to the bench, the court indicated it was waiting to receive more information from the State Bar, and was "not prepared at th[at] moment

to make a decision on the counsel issue." Later that afternoon, after having reviewed information provided by the State Bar related to Defendant's complaint against Counsel, the trial court concluded that "the concerns expressed in [Defendant's] complaint [did] not rise to the level of a grievance" and "[did] not create a conflict of interest that would deprive [D]efendant of his constitutional right to effective assistance of counsel." Defendant's motion to remove Counsel was denied.

3. Discussion

An indigent defendant is constitutionally entitled to have competent counsel appointed to represent him at trial. *Sweezy*, 291 N.C. at 371, 230 S.E.2d at 528 (citations omitted). However, an accused does not have the right to demand that the court appoint an attorney of his choice, or "to insist that [appointed] counsel be removed and replaced with other counsel merely because [the] defendant becomes dissatisfied with his attorney's services." *Id.* (citations omitted). "A trial court is constitutionally required to appoint substitute counsel whenever representation by counsel originally appointed would amount to [a] denial of [the] defendant's right to effective assistance of counsel[.]" *State v. Thacker*, 301 N.C. 348, 352, 271 S.E.2d 252, 255 (1980) (citations omitted). "In the absence of any substantial reason for the appointment of replacement counsel, an indigent defendant must accept counsel appointed by the court, unless he wishes to present his own defense." *Hutchins*, 303 N.C. at 335, 279 S.E.2d at 797. Our Supreme Court has held that

> [a] disagreement between the defendant and his court-appointed counsel over trial tactics is not sufficient to require the trial court to replace court-appointed counsel with another attorney. In order to be granted substitute counsel, the defendant must show good cause, such as *a conflict of interest, a complete breakdown in communication, or an irreconcilable conflict which leads to an apparently unjust verdict*.

*State v. Gary*, 348 N.C. 510, 516, 501 S.E.2d 57, 62 (1998) (citations and internal quotation marks omitted) (emphasis added). Additionally,

> when faced with a claim of conflict and a request for appointment of substitute counsel, the trial court must satisfy itself only that present counsel is able to render competent assistance and that the nature or degree of the conflict is not such as to render that assistance ineffective.

*Thacker*, 301 N.C. at 353, 271 S.E.2d at 256. If the trial court is satisfied "that the original counsel is reasonably competent to present [the] defendant's case and the nature of the conflict between [the] defendant and counsel is not such as would render counsel incompetent or ineffective to represent *that* defendant, denial of [the] defendant's request to appoint substitute counsel is entirely proper." *Id.* at 352, 271 S.E.2d at 255 (emphasis in original).

We find nothing in the record to support Defendant's contention that the denial of either of his motions to remove appointed counsel amounted to an abuse of discretion. Neither Defendant's motions as written, nor his statements at the hearings on those motions, identified grounds sufficient to require the trial court to appoint substitute counsel. *See State v. Gentry*, 227 N.C. App. 583, 588, 743 S.E.2d

235, 239 (2013) (concluding that "although [d]efendant expressed dissatisfaction with the performance of his assigned counsel on several occasions, he failed to establish the requisite 'good cause' to [require] appointment of substitute counsel or to establish that his assigned counsel could not provide him with constitutionally adequate representation."). The bases for Defendant's dissatisfaction with Counsel consisted primarily of general assertions that Defendant lacked confidence in Counsel's abilities, disagreed with Counsel over certain trial tactics, and believed he was not being fully informed about all aspects of his case. "General dissatisfaction . . . is not a sufficient basis to appoint new counsel." *State v. Glenn*, 221 N.C. App. 143, 149, 726 S.E.2d 185, 189 (2012) (citation omitted). In essence, Defendant's arguments amounted to unsupported allegations that Counsel was not acting in Defendant's best interests. Defendant failed to demonstrate any conflict of interest, much less one that would render Counsel's assistance "incompetent or ineffective." *See Thacker*, 301 N.C. at 352, 271 S.E.2d at 255. "The hearing[s] . . . conducted by [both trial court judges] fulfilled the obligation of the [trial] court to inquire into [D]efendant's reasons for wanting to discharge his attorney[] and to determine whether those reasons were legally sufficient to require the discharge of counsel." *Hutchins*, 303 N.C. at 335, 279 S.E.2d at 797.

We also find no indication Defendant received ineffective assistance of counsel at trial (*i.e.*, that Defendant was "materially prejudiced by the denials of his motions."). To establish ineffective assistance of counsel, a defendant

> must first show that counsel's performance fell below an objective standard of reasonableness as defined by professional norms. This means that [the] defendant must show that his attorney made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, once [the] defendant satisfies the first prong, he must show that the error committed was so serious that a reasonable probability exists that the trial result would have been different absent the error. Thus, [the] defendant must show that the error committed was so grave that it deprived him of a fair trial because the result itself is considered unreliable.

*State v. Lee*, 348 N.C. 474, 491, 501 S.E.2d 334, 345 (1998) (citations and internal quotation marks omitted).

On appeal, Defendant contends Counsel rendered ineffective assistance by: (1) presenting no evidence on Defendant's behalf; (2) not challenging Investigator Burger's testimony that Defendant confessed to the Torero's robbery; (3) not challenging other "damaging testimony;" and (4) not objecting to "scores of prejudicial exhibits [offered by the State][.]" Defendant's examples, however, merely reiterate Defendant's disagreement with Counsel over trial tactics, and do not demonstrate that Counsel's performance "fell below an objective standard of reasonableness." *See*, *e.g.*, *State v. Poole*, 305 N.C. 308, 314, 289 S.E.2d 335, 340 (1982) ("'Trial counsel,

whether court-appointed or privately employed, is not the mere lackey or 'mouthpiece' of his client. [Counsel] is in charge of and has the responsibility for the conduct of the trial, including the selection of witnesses to be called to the stand on behalf of his client and the interrogation of them.'" (quoting *State v. Robinson*, 290 N.C. 56, 66, 224 S.E.2d 174, 179 (1976))).

Defendant also argues that Counsel "failed to engage in plea negotiations with the district attorney" and did not "adequately explain[] to him the consequences of entering a plea [with respect to the habitual felon charge]." These allegations are unsupported by the record before us. *See State v. Stroud*, 147 N.C. App. 549, 554-55, 557 S.E.2d 544, 547 (2001) (noting that where an ineffective assistance claim is raised on direct appeal, rather than by motion for appropriate relief, appellate court may review the claim, if at all, "only on the record before [it], without the benefit of information . . . that could be provided in a full evidentiary hearing on a motion for appropriate relief." (internal citation and internal quotation marks omitted)). Defendant did not assert, in either his motions to substitute appointed counsel or during the hearings on those motions, that Counsel had failed to engage in plea negotiations. Defendant also did not express interest in accepting the State's plea offer. At the 19 August 2015 hearing, Defendant indicated Counsel had entered a plea of not guilty without consulting Defendant beforehand. The trial court asked Defendant: "So you don't want to plead not guilty?" Defendant responded: "Well, no.

I do." There is no evidence that Counsel "failed to engage in plea negotiations with the district attorney," at Defendant's request or otherwise.

Defendant's contention that Counsel failed to adequately explain the consequences of pleading guilty to the habitual felon charge is likewise unsupported. After the jury returned its guilty verdicts, the trial court examined Defendant at length regarding his decision to plead guilty to attaining the status of an habitual felon. The following exchange ensued:

> THE COURT: Has this habitual felon status been explained to you by your lawyer? Do you understand the nature of that status, and do you understand each element of that status?
>
> DEFENDANT: Yes.
>
> THE COURT: Have you and your lawyer discussed possible defenses if any to this habitual felon status?
>
> DEFENDANT: Yes.
>
> THE COURT: Are you satisfied with your lawyer's legal services?
>
> DEFENDANT: No.
>
> THE COURT: Okay. Can you explain yourself, sir?
>
> DEFENDANT: Just the things that we had talked about earlier.
>
> THE COURT: All right. Are you satisfied that [Counsel] has given you a clear explanation as to what the habitual status means?

> DEFENDANT: Yes, sir.
>
> THE COURT: And do you understand – are you satisfied with the explanation of what [Counsel] has told you the defenses to that status are?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: All right. So anything in connection with his advice that he has given you with respect to the . . . habitual felon status, is there anything you are dissatisfied just with that piece of his representation?
>
> DEFENDANT: No, sir.
>
> THE COURT: All right. So I understand the issues [with Counsel] you raised prior to trial.
>
> DEFENDANT: Okay.
>
> THE COURT: But other than those, you are satisfied with the explanation that you have received from [Counsel], the advice he has given you regarding this habitual felon status; is that correct?
>
> DEFENDANT: Yes, sir.

The trial court reviewed with Defendant the meaning and effects of pleading guilty to habitual felon status. Defendant told the court he had not received the same explanation from Counsel, and asked: "Could . . . I speak with my lawyer[?]" After consulting with Counsel, Defendant pleaded guilty to having attained habitual felon status, and repeatedly affirmed to the court his agreement with and understanding of the plea arrangement. Thus, Defendant's own statements at trial directly

contradict his contention on appeal that Counsel did not adequately inform him of the consequences of entering a plea. This argument is overruled.

## III. Joinder of Offenses

Defendant next argues the trial court erroneously joined the offenses arising from the Hot Tin Roof, Torero's, and Pueblo Viejo break-ins. According to Defendant, those incidents lacked the requisite "transactional connection" necessary for joinder, because the crimes "occurred in two counties and involved three different businesses owned by three different people," and because the evidence failed to show they were "part of an overarching conspiracy."

### A. Standard of Review

N.C. Gen. Stat. § 15A-926(a) (2015) provides that two or more offenses may be joined for trial "when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." 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). To demonstrate abuse of discretion, a defendant must show the ruling was "manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision." *State v. Campbell*, 359 N.C. 644, 673, 617 S.E.2d 1, 19 (2005) (citation and quotation marks omitted).

While we review joinder of offenses under the abuse of discretion standard, the initial determination of "[w]hether [the requisite transactional] connection exists so that the offenses may be joined for trial is a fully reviewable question of law." *State v. Williams*, 355 N.C. 501, 529, 565 S.E.2d 609, 626 (2002). "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." *State v. Montford*, 137 N.C. App. 495, 498, 529 S.E.2d 247, 250 (2000) (citation and internal quotation marks omitted). The latter part of the inquiry "is addressed to the sound discretion of the trial judge[.]" *Id.* (citation omitted). Further, even if joinder was erroneously permitted, a defendant must show prejudice, *i.e.*, "a reasonable possibility that the jury would have reached a different verdict if the . . . charge[s] had not been joined." *Neal*, 76 N.C. App. at 521, 333 S.E.2d at 540 (citing N.C. Gen. Stat. § 15A-1443(a)).

B. Analysis

"[S]imilarity of crimes alone is insufficient to create the requisite transactional connection" under N.C.G.S. § 15A-926(a). *Montford*, 137 N.C. App. at 498, 529 S.E.2d at 250. "Rather, consideration must be given to several factors, *no one of which is dispositive*. 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

(emphasis added). A sufficient transactional connection may exist where the offenses charged share a common thread of facts and a common motive. *See State v. Styles*, 116 N.C. App. 479, 482, 448 S.E.2d 385, 387 (1994); *see also State v. Howie*, 116 N.C. App. 609, 615, 448 S.E.2d 867, 871 (1994) (rejecting defendant's contention that a four-week lapse of time between two offenses precluded any transactional connection between them, where the evidence "clearly show[ed] that the offenses were not only similar, but that they *involved the same pattern of operation*." (emphasis added)). In *State v. Bracey*, 303 N.C. 112, 277 S.E.2d 390 (1981), in finding multiple offenses were properly joined for trial, our Supreme Court considered it "crucial to note the trial judge's ruling was based on *commonality of facts* and not just on a commonality of crimes." *Id.* at 117, 277 S.E.2d at 394 (emphasis added). As in *Bracey*, we find the evidence in the present case "shows a similar modus operandi and similar circumstance[s] in victims, location, time and motive." *Id.* at 118, 277 S.E.2d at 394.

In *State v. Williams*, 74 N.C. App. 695, 329 S.E.2d 705 (1985), which Defendant cites favorably, this Court observed that "[i]n 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). Defendant asserted before the trial court that joinder was improper in the present case because the alleged offenses "[took] place on

various dates in various places" and because "the asserted evidence in each case [was] different." On appeal, Defendant also argues that "[m]any of the 'fingerprints' cited by the State are commonplace . . . [and are] circumstances inherent to virtually all such cases." In doing so, however, Defendant essentially acknowledges the numerous factual similarities between all three break-ins, including (1) that the incidents occurred during early morning hours, while the businesses were closed; (2) the taking of money and other valuable items from the premises; and (3) the perpetrator's attempts to disable each business's security systems. Defendant further concedes that "the yellow [paint] marks found at each crime scene" were a "uniting feature of these [individual] incidents[.]" We are persuaded that "the nature of the robberies committed, the facts and circumstances surrounding each robbery, and the time frame during which each robbery was committed, all . . . bring to view a pattern of offenses committed by . . . [D]efendant." *State v. Breeze*, 130 N.C. App. 344, 354-55, 503 S.E.2d 141, 148 (1998).

In *State v. Perry*, 142 N.C. App. 177, 541 S.E.2d 746 (2001), the trial court joined charges arising from a series of automobile break-ins in Chapel Hill with charges arising from several home invasions that occurred in Durham several weeks later, under "circumstances [that were] quite different[.]" *Id.* at 181, 541 S.E.2d at 749. In finding there was an insufficient transactional connection to support joinder, this Court noted that the "sole common denominator" between the charges related to

the car break-ins and the charges related to the home invasions was that evidence found in the defendant's bedroom independently linked him to the Chapel Hill automobile break-ins and the Durham home invasions. *Id.* By contrast, in the present case, there were multiple factual commonalities connecting all three break-ins. The break-ins occurred within a three-week span, at locations in, or in the case of Torero's, within a few miles of, Orange County, at about the same time of day. Each break-in targeted a drinking and/or eating establishment. In each incident, the perpetrator gained entry by the forcible use of prying tools, and attempted to disable any electronic security system or other surveillance equipment. Once inside, the perpetrator attempted to remove cash or other valuables. Yellow paint marks or yellow pry tools were found at each scene. Finally, evidence subsequently found in or around Defendant's car and motel room appeared to implicate Defendant in connection with all three break-ins, in addition to the unindicted burglary of El Patron. Considered together, these circumstances suggest the incidents were part of "a series of acts or transactions connected together or constituting parts of a single scheme or plan." N.C.G.S § 15A-926(a).

"Since a transactional connection has been found, the trial court's ruling on joinder of offenses will only be disturbed [if] it was so arbitrary that it could not have been the product of a reasoned decision." *State v. Holmes*, 120 N.C. App. 54, 62, 460 S.E.2d 915, 920 (1995) (citation and internal quotation marks omitted). "The test is

whether the offenses are so separate in time and place and so distinct in circumstances as to render a consolidation unjust and prejudicial to [the] defendant." *Breeze*, 130 N.C. App. at 354, 503 S.E.2d at 148. Defendant has failed to make such a showing, and we conclude the trial court did not abuse its discretion in joining the offenses for trial.

## IV. Evidence of the El Patron Burglary

Defendant contends the trial court abused its discretion by admitting evidence of the unindicted El Patron burglary.

### A. Standard of Review

In general, "[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." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2015). Such evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, [or] identity[.]" *Id.* "We review a trial court's determination to admit evidence under Rule 404(b) for an abuse of discretion." *State v. Christian*, 180 N.C. App. 621, 626, 638 S.E.2d 470, 474 (2006).

### B. Analysis

"In order for evidence to be admissible under Rule 404(b), it must be offered for a proper purpose, must be relevant, must have probative value that is not substantially outweighed by the danger of unfair prejudice to the defendant, and, if

requested, must be coupled with a limiting instruction." *State v. Corum*, 176 N.C. App. 150, 156, 625 S.E.2d 889, 893 (2006) (citation and internal quotation marks omitted). Our Supreme Court has characterized Rule 404(b) as a rule of "*inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (emphases in original). Thus,

> evidence of other crimes or wrongs committed by a defendant is admissible *even if it shows a propensity to act in conformity therewith* so long as it also is relevant for some purpose *other than* to show that [the] defendant has the propensity for the type of conduct for which he is being tried.

*State v. Martin*, 191 N.C. App. 462, 466, 665 S.E.2d 471, 474 (2008) (citation and internal quotation marks omitted) (first emphasis added).

Rule 404(b) evidence is offered for a proper purpose if "the [prior acts] are sufficiently similar and not so remote in time as to be more probative than prejudicial[.]" *Id.* at 467, 665 S.E.2d at 474 (citation and internal quotation marks omitted). "Prior acts are sufficiently similar if there are some unusual facts present in both crimes that would indicate that the same person committed them." *State v. Beckelheimer*, 366 N.C. 127, 131, 726 S.E.2d 156, 159 (2012) (citation and internal quotation marks omitted); *see also State v. Adams*, 220 N.C. App. 319, 322, 727 S.E.2d

577, 580 (2012) ("To be admissible under [Rule 404(b)], evidence of other acts must contain similarities that support the *reasonable inference that the same person* committed both the earlier and the later [acts]." (citation and quotation marks omitted) (emphasis in original)).

In the present case, the State argues that the El Patron burglary was sufficiently similar to the Hot Tin Roof, Torero's, and Pueblo Viejo break-ins as to show Defendant's motive, intent, plan or scheme, and identity. Defendant contends the State has merely identified "characteristics inherent to most crimes of [this] type," insufficient to show the level of similarity required by Rule 404(b). *See State v. Carpenter*, 361 N.C. 382, 390, 646 S.E.2d 105, 111 (2007) (citation and quotation marks omitted). According to Defendant, "[t]he El Patron incident is so lacking [in] distinctive characteristics as to fail to support a reasonable inference that [Defendant] committed all the alleged acts." We disagree.

The State contended at trial that evidence related to the El Patron burglary was admissible under Rule 404(b) "on [the] issue of common plan or scheme principally, but also for motive, intent or knowledge and identity[.]" Defense counsel did not dispute that argument, objecting to the evidence only "as being unduly prejudicial to [Defendant][.]" We conclude the trial court did not abuse its discretion in finding that the El Patron break-in was offered for "purposes unrelated to [Defendant's] character or propensity, but rather at a minimum for the purposes of

identity and perhaps common plan or scheme." The El Patron incident occurred between the Torero's and Pueblo Viejo break-ins. The *modus operandi* by which the El Patron burglary was committed shared numerous factual similarities with the other three break-ins committed by Defendant in the same three-week span. The El Patron break-in occurred in Durham, where Defendant had been staying in a motel. However, evidence removed from Defendant's motel room implicated Defendant in both the El Patron break-in and the break-ins at Torero's and Pueblo Viejo.[3] Considered together, this was sufficient to support a reasonable inference that Defendant committed the break-ins, including the El Patron burglary, and that he did so as part of a common plan or scheme.

Defendant further argues that, even if the El Patron evidence was offered for a proper purpose and was probative as to a fact or issue in the Torero's and Pueblo Viejo incidents, the evidence "had no relevance to the Hot Tin Roof incident, and in that case was purely prejudicial." However, in light of the transactional connection between the Hot Tin Roof, Torero's, and Pueblo Viejo burglaries, the El Patron incident (which, again, occurred between the Torero's and Pueblo Viejo burglaries) was relevant to the Hot Tin Roof incident insofar as both burglaries were part of Defendant's "common plan or scheme." Defendant has also failed to demonstrate that

[3] The laptop stolen from El Patron and recovered from Defendant's motel room had files on it related to Pueblo Viejo. Upon further investigation, officers discovered El Patron and Pueblo Viejo (and, thus, the laptop) were owned by the same individual.

the probative value of the El Patron evidence was substantially outweighed by the danger of unfair prejudice. The evidence was admitted for the proper purposes of showing identity and a common plan or scheme, and the jury received limiting instructions to that effect.

## V. Conclusion

For the reasons set forth above, we find no error in Defendant's trial.

NO ERROR.

Judges ELMORE and DIETZ concur.

Report per Rule 30(e).