NO. COA00-1443

NORTH CAROLINA COURT OF APPEALS

Filed: 19 March 2002

STATE OF NORTH CAROLINA

v. Wayne County
No. 99 CRS 54892

FREDERICK WAYNE EVERETT

Appeal by defendant from judgment entered 13 April 2000 by Judge Benjamin G. Alford in Superior Court, Wayne County. Heard in the Court of Appeals 8 November 2001.

Attorney General Roy Cooper, by Assistant Attorney General E. Burke Haywood, for the State.

Adrian M. Lapas, for defendant-appellant.

McGEE, Judge.

Frederick Wayne Everett (defendant) was charged in a true bill of indictment on 31 January 2000 with breaking and entering and larceny after breaking and entering a building occupied by Anthony R. Stovall, doing business as ArtWare; possession of stolen goods owned by Anthony R. Stovall, doing business as ArtWare; first degree burglary and larceny after breaking and entering a dwelling occupied by Rajendra A. Amin; possession of stolen goods belonging to Rajendra A. Amin; and breaking and entering a building occupied by George A. Stewart, doing business as Antiquities.

The evidence for the State at trial tended to show the

following. Anthony Stovall testified that he entered his place of business, ArtWare, in Goldsboro on the morning of 10 November 1999 and saw that items were out of place and some pictures, clothing and tools were missing. Mr. Stovall testified that he walked to the back of the building and discovered that the top panel of the ceiling between the first and second floors had been knocked down. He saw that a door leading to the business next door that was normally closed and locked was open with the lock securing the door ripped out of the frame. Mr. Stovall entered the business next door and spoke with the business owner. Mr. Stovall stated that he saw a crowbar in the business next door that "was like a crowbar" he kept on the second floor of his business.

Rejendra Amin, proprietor of the Budget Inn in Goldsboro, testified that he, his wife, and children have resided at the Budget Inn since 1984. He further testified that the family slept in a bedroom behind the lobby and that a door led from the bedroom into the lobby, which contained a sitting area and television. From the lobby, a door opened to the outside of the building and was kept locked twenty-four hours a day. He stated that to enter, customers must ring a buzzer. Also from the lobby, a set of locked glass doors opened into a restaurant that had been closed to the public for several years.

Mr. Amin testified that a door from the restaurant area led to a kitchen and both areas were sometimes used by his family for cooking and other family purposes. The kitchen had a metal door which opened to the outside and which Mr. Amin testified he kept

locked, as well as a screen door that was not locked. Adjacent to the kitchen was a "burned out room" formerly used as a nightclub, which was no longer in use. The former nightclub had plate glass windows that were broken, permitting entry into the room. The door between the kitchen and the nightclub was nailed shut.

Mr. Amin testified that on the evening of 12 November 1999, he and his family were in their bedroom. He testified that he heard a noise at 2:15 a.m. from the "back kitchen," which he described as a "big clash like something fall[ing] down from the ceiling" followed by the "noise of pots and pans . . . falling down[.]" Mr. Amin went to the lobby and looked inside the restaurant where he saw a man coming towards the glass doors separating the restaurant and lobby. The doors were locked so the man went out the back area of the building after taking a bicycle belonging to Mr. Amin's son. Mr. Amin testified that he grabbed a metal stick and chased the man out the back door. At trial, Mr. Amin identified defendant as the person who broke into his "house". After defendant left the building, Mr. Amin saw that the ceiling fan in his kitchen, along with six ceiling tiles, had fallen on "the ground." Prior to 12 November 1999, the ceiling had been damaged in a fire with two holes burned in the ceiling tiles.

Officer James Lewis testified that he responded to a call from the area of the Budget Inn. He saw a man with a stick chasing another man on a bicycle. Officer Lewis approached the man carrying the stick and determined he was the victim, Mr. Amin. Mr. Amin told Officer Lewis that the man on the bicycle had stolen the

bicycle from "his residence." Officer Lewis then went after the man on the bicycle who had ridden into an alleyway. In the alleyway, Officer Lewis stated that he saw the bike lying on the ground and a pair of shoes behind a wall. Officer Lewis testified he told the man to come out from behind the wall and at that point a man Officer Lewis identified at trial as defendant stepped out from behind the wall. Officer Lewis then handcuffed defendant and took him to the police station where he read defendant his *Miranda* rights. Defendant initialed each question signifying that he understood his rights. Defendant later gave Officer Lewis two conflicting statements concerning his presence at the motel.

Officer J.B. Clifford testified he had worked with the Goldsboro Police Department for two and a half years and prior to that was in law enforcement in Norfolk, Virginia for sixteen years. Officer Clifford testified that he received a dispatch to the Budget Inn in reference to a "break and entering" on 12 November 1999. He testified that the "ceiling had caved in and the fan was [lying] on the ground." When asked his opinion of "how access was gained to Mr. Amin's residence," Officer Clifford stated, over defendant's objection, that he believed "the suspect came [in through the] burned out area[,]. . . climbed up to the wall [and] got into the crawl space between [the nightclub] and the kitchen area. He was up on the ceiling and he fell through, at which time he came in" the kitchen area.

At the close of the State's evidence, defendant moved to dismiss all charges. The trial court granted defendant's motion as

to count seven of the indictment, breaking and entering a building occupied by George A. Stewart, doing business as Antiquities. Defendant presented no evidence.

The jury found defendant guilty of the remaining counts. The trial court determined defendant had a prior record level of three and sentenced defendant on count one, first degree burglary of a dwelling occupied by Rajendra A. Amin, within the presumptive range to a minimum of 103 months and a maximum of 133 months in prison. The trial court consolidated counts two and three, larceny after breaking and entering a dwelling occupied by Mr. Amin and possession of stolen goods belonging to Mr. Amin, and sentenced defendant within the presumptive range to a minimum of ten months and a maximum of twelve months in prison. The trial court consolidated the remaining counts and sentenced defendant within the presumptive range to a minimum of eight months and a maximum of ten months in prison. Defendant appeals.

The State filed a motion to dismiss defendant's appeal for alleged violations of the N.C. Rules of Appellate Procedure arguing that defendant failed to timely file his brief in violation of N.C.R. App. P. 27 and 28. We deny the State's motion to dismiss and exercise our discretion under N.C.R. App. P. 2 to determine defendant's case on its merits, and we allow defendant's motion to deem his brief timely filed.

We note that in his brief to this Court, defendant failed to address assignments of error numbers five and seven set forth in the record on appeal. These assignments of error are therefore

deemed abandoned. N.C.R. App. P. 28(a) ("Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned.").

I.

Defendant first argues that the trial court erred in entering judgment upon verdicts of guilty on both counts of larceny as well as both counts of possession of stolen goods. Defendant contends that he is entitled to have the convictions for possession of stolen goods vacated and the case remanded for a re-sentencing hearing on the two counts of larceny. The State argues, however, that the trial court did not err in its judgment because the offenses of larceny and the offenses of possession of the stolen property which was the subject of the larceny, "are two separate and distinct offenses, and double jeopardy considerations therefore do not prohibit punishment of the same person for both offenses." The State argues there was no prejudice to defendant because the two charges were consolidated and defendant was sentenced within the presumptive range appropriate to either crime; defendant was therefore not punished for both crimes.

Our Supreme Court held in *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982) that "though a defendant may be indicted and tried on charges of larceny, receiving, and possession of the same property, he may be convicted of only *one* of those offenses." *Id.* at 236-37, 287 S.E.2d at 817 (emphasis added). Therefore, a defendant's convictions for larceny and possession of the same

property he stole are "in contravention of the 'bright line' rule of *Perry*. Since the defendant can only be convicted of either the larceny or the possession of stolen property, judgment must be arrested in one of the two cases." *State v. Dow*, 70 N.C. App. 82, 87, 318 S.E.2d 883, 887 (1984). To determine which judgment must be arrested, "'the sentence which appears later on the docket, or is second of two counts of a single indictment, or is the second of two indictments, will be stricken.'" *Id.* (quoting *State v. Pagon*, 64 N.C. App. 295, 299, 307 S.E.2d 381, 384 (1983)).

In applying the "bright line" rule of *Perry* to this case, because the two counts of possession of stolen goods were consolidated for sentencing with the two counts of larceny, the sentences as to the possession of stolen goods must be vacated and the two larceny convictions remanded for re-sentencing. Although the trial court sentenced defendant within the presumptive range in each consolidated judgment, we cannot infer that the trial court did not consider all counts in determining an appropriate sentence. *See State v. Brown*, 350 N.C. 193, 513 S.E.2d 57 (1999) and *State v. Gilley*, 135 N.C. App. 519, 522 S.E.2d 111 (1999). We remand the non-vacated larceny convictions to the trial court for re-sentencing.

II.

Defendant next argues that the trial court erred in denying his motion to dismiss with respect to the charge of first degree burglary because the State failed to produce sufficient evidence to support all elements of the charge.

Upon a defendant's motion to dismiss

> all of the evidence, whether competent or incompetent, must be considered in the light most favorable to the state, and the state is entitled to every reasonable inference therefrom. Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. In considering a motion to dismiss, it is the duty of the court to ascertain whether there is substantial evidence of each essential element of the offense charged. 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) (citations omitted).

A defendant is guilty of first degree burglary

> [i]f the crime be committed in a dwelling house, or in a room used as a sleeping apartment in any building, and any person is in the actual occupation of any part of said dwelling house or sleeping apartment at the time of the commission of such crime[.]

N.C. Gen. Stat. § 14-51 (1999).

A "dwelling-house" is defined in Black's Law Dictionary as "[t]he house or other structure in which a person lives; a residence or abode." Black's Law Dictionary, 524 (7th ed. 1999). Additionally, the law protects

> "not only the house in which [a person] sleeps, but also all the other appurtenances thereto[.] . . . Thus the kitchen, [and] the laundry . . . are within its protection, for they are . . . used as parts of one whole, each contributing, in its way, to the comfort or convenience of the place, as a mansion or dwelling. . . . But when it is proved that they are used for other purposes, as for labor, as a workshop--for vending goods, as a store-house, this destroys the presumption. It then appears that they are there for purposes unconnected with the actual dwelling-

> house[.] . . . The house, as a dwelling, is equally as comfortable and convenient without as with them. Their contiguity to the dwelling may afford convenience or comfort to the occupant as a mechanic, or laborer, or shop-keeper, but none to him as a house-keeper."

State v. Merritt, 120 N.C. App. 732, 737-38, 463 S.E.2d 590, 593 (1995), *disc. review denied*, 342 N.C. 897, 467 S.E.2d 738 (1996) (quoting *State v. Jenkins*, 50 N.C. 430, 431-32 (1858)).

Defendant contends the trial court erred in denying his motion to dismiss because the structure defendant allegedly broke and entered into was neither a "dwelling house" nor a "sleeping apartment." Defendant contends that the structure in which the Amins resided was a commercial structure utilized as a motel and, because of the commercial nature of the structure, this case is controlled by our Supreme Court's decision in *State v. Foster*, 129 N.C. 704, 40 S.E. 209 (1901). The Court stated in *Foster* that "such buildings, as store-houses and other houses in which there is a sleeping apartment, are [not] regarded as dwelling-houses, [because the burglary statute makes] a clear distinction . . . between . . . dwelling-houses [and sleeping apartments]." *Id.* at 709-10, 40 S.E. at 211. Defendant "does not dispute that the victims in the present case resided in a room off of the lobby in the motel." However, he contends that because these rooms were partitioned with locked doors leading to the restaurant, and with a door leading from the lobby to the outside that was kept locked, the entire sleeping apartment of the victims consisted only of the bedroom and lobby. Therefore, defendant contends that because he

did not break into the Amin family's occupied sleeping apartment, and because the building is not a "dwelling house," he cannot be guilty of first degree burglary.

The State argues, however, that the issue before the jury was whether defendant entered a "dwelling house," not whether he entered a "sleeping apartment." Considering the evidence in a light most favorable to the State, we agree with the State that the trial court did not err in denying defendant's motion to dismiss. A motel room is generally recognized in this State as a "sleeping apartment," and we agree with defendant that there is no evidence defendant entered into the Amins' bedroom or into the lobby. *See State v. Hobgood*, 112 N.C. App. 262, 264, 434 S.E.2d 881, 883 (1993) (citing *State v. Nelson*, 298 N.C. 573, 597, 260 S.E.2d 629, 646 (1979)), *disc. review denied*, 335 N.C. 772, 442 S.E.2d 523 (1994). However, whether defendant entered a "sleeping apartment" is not at issue in this case. Rather, the issue is whether defendant broke and entered an occupied dwelling. The bedroom, lobby, restaurant and kitchen contribute to the "comfort or convenience" of the Amin family "as a . . . dwelling." *Jenkins*, 50 N.C. at 431. As Mr. Amin testified, his family resided mainly in the bedroom, but also had a sitting area in the lobby which had a television, and the family used the restaurant and kitchen for cooking and "family purposes." Although customers are permitted in the lobby, and the building is dedicated to a business purpose as a motel, the portions of the building the Amin family used for "family purposes" are private and the public may enter only after

ringing a buzzer. Based on the evidence in the record, we find there is sufficient evidence that defendant did break and enter an occupied dwelling.

Defendant's first and eighth assignments of error are overruled.

III.

Defendant, by his third argument, contends the trial court erred in allowing the State's motion to join the offenses set forth in the indictment.

"Two or more offenses may be joined in one pleading or for trial when the offenses . . . 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." N.C. Gen. Stat. § 15A-926(a) (1999). In determining if a transactional connection exists between offenses, the courts take into consideration "such factors as the nature of the offenses charged . . . and the unique circumstances of each case[.]" *State v. Herring*, 74 N.C. App. 269, 273, 328 S.E.2d 23, 26, *disc. review denied*, 314 N.C. 671, 335 S.E.2d 324 (1985), *aff'd*, 316 N.C. 188, 340 S.E.2d 105 (1986). Thus, "[a] defendant is not prejudiced by the joinder of two crimes unless the charges are 'so separate in time and place . . . as to render the consolidation unjust and prejudicial to defendant.'" *State v. Howie*, 116 N.C. App. 609, 615, 448 S.E.2d 867, 871 (1994) (citations omitted). We note that public policy favors consolidation because it

> "expedites the administration of justice, reduces the congestion of trial dockets,

> conserves judicial time, lessens the burden upon citizens who must sacrifice both time and money to serve upon juries and avoids the necessity of recalling witnesses who would otherwise be called upon to testify only once."

State v. Boykin, 307 N.C. 87, 91-92, 296 S.E.2d 258, 261 (1982) (citations omitted). In light of these policy considerations, the decision to consolidate offenses "is a matter which lies within the sound discretion of the trial judge, and his ruling will not be disturbed absent a showing that joinder would hinder or deprive defendant of his ability to present his defense." *State v. Newman and State v. Newman*, 308 N.C. 231, 236, 302 S.E.2d 174, 179 (1983) (citing *State v. Greene*, 294 N.C. 418, 241 S.E.2d 662 (1978) and *State v. Braxton*, 294 N.C. 446, 242 S.E.2d 769 (1978)).

Defendant contends there is no transactional connection between the offenses in this case because they involve different victims, they occurred on different dates, and at different locations. As a consequence of the joinder of offenses, defendant argues he was prejudiced by the "'overload' effect of [the] joinder" because he "intended to offer alternative defenses to the charged crimes[.]" We disagree.

The offenses in this case occurred within a two-day period and within three blocks of each other and are therefore closely connected in time and place. Further, as the State contends, both crimes were "second floor jobs" and demonstrate a similar *modus operandi* because defendant gained access through the ceilings of both buildings. The trial court did not abuse its discretion in joining the two offenses for trial. We find no error. Defendant's

fourth assignment of error is overruled.

IV.

Defendant next argues the trial court erred in allowing Officer Clifford to give opinion testimony, in violation of N.C. Gen. Stat. § 8C-1, Rule 701, as to how defendant may have entered the motel.

Rule 701 states that

> [i]f the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C. Gen. Stat. § 8C-1, Rule 701 (1999).

Defendant contends that Officer Clifford's opinion testimony with respect to how defendant entered the motel went beyond the purview of Rule 701 because a proper foundation or basis was not laid for Officer Clifford's opinion and no evidence was presented as to his training or prior case experience, except that he had been a law enforcement officer for eighteen and one-half years. Defendant argues that "[f]or all we know, Officer Clifford could have been a traffic cop for [these] years and this is his first breaking and entering case."

Defendant further argues that allowing the officer's opinion testimony at trial prejudiced defendant because defendant gave two conflicting statements to the police as to how he entered the motel. Defendant continues, "[a]s such, with defendant's statement in evidence that he fell through the roof, it is prejudicial to

allow Officer Clifford to assert, without proper foundation, how defendant may have gained access into the building."

As Rule 701 requires, Officer Clifford's opinion testimony was rationally based on his perception of what he saw at the motel during his investigation of the crime scene. Also, his opinion testimony could certainly be helpful to the jury in determining how the ceiling fell to the floor. The record includes substantial physical evidence to support Officer Clifford's theory of entry. Mr. Amin testified at trial that on the night of the robbery, he heard a "big clash" from his bedroom, and that he noticed the ceiling fan and "about six [ceiling] tiles" had fallen on the kitchen floor, and that they were not on the floor before that night. Additionally, defendant produced no evidence that Officer Clifford's eighteen and one-half years of experience in law enforcement was insufficient experience on which to base his opinion.

Defendant's sixth assignment of error is overruled.

V.

By his final argument, defendant contends the trial court erred in denying his motion to dismiss because a fatal variance existed between the indictment and proof presented at trial.

"A defendant must be convicted, if convicted at all, of the particular offenses charged in the bill of indictment. The allegations and the proof must correspond. A fatal variance may be taken advantage of by motion to dismiss." *State v. Bost*, 55 N.C. App. 612, 614, 286 S.E.2d 632, 634 (1982) (citing *State v.*

Muskelly, 6 N.C. App. 174, 169 S.E.2d 530 (1969) and 4 Strong's N.C. Index 3d *Criminal Law* § 107 (1976)).

Defendant argues that "the indictment is fatally defective" because it "alleges that defendant broke into a dwelling but the evidence clearly indicates that defendant broke into a building in which a sleeping apartment is present[.]" Because we have determined that substantial evidence was presented at trial that defendant broke into a "dwelling house" for purposes of the burglary statute, this argument is without merit.

Defendant further argues that although the indictment states that "the 'dwelling' belonging to the victim consisted of Room 133 of the Budget Inn[,] [t]he evidence clearly . . . demonstrates that defendant broke and entered into a portion of the commercial structure that was not Room 133." "[A]n indictment for burglary is fatally defective if it fails to identify the premises broken and entered with sufficient certainty to enable the defendant to prepare his defense and to offer him protection from another prosecution for the same incident." *State v. Coffey*, 289 N.C. 431, 438, 222 S.E.2d 217, 221 (1976). We find there was a sufficient description in the indictment in the case before us to withstand defendant's motion to dismiss. The indictment charged defendant with breaking and entering "a dwelling of Rajendra A. Amin" and did not state this dwelling *consisted of* Room 133 as defendant contends. Defendant was fully apprised that he was being charged with first degree burglary for the breaking and entering of "a dwelling." The evidence at trial was sufficient to support this

count in the indictment. We hold there was not a fatal variation between the allegations in the indictment and the proof at trial. Defendant's second assignment of error is overruled.

No error in defendant's conviction for first degree burglary. No error in defendant's convictions on the two counts of breaking and entering an occupied building. Defendant's convictions on the two counts of possession of stolen goods are vacated. The two counts of larceny after breaking and entering a dwelling are remanded for re-sentencing.

No error in part, vacated in part and remanded for re-sentencing.

Judges HUNTER and BRYANT concur.

Report per Rule 30(e).