NO. COA01-1035

NORTH CAROLINA COURT OF APPEALS

Filed: 2 July 2002

STATE OF NORTH CAROLINA,
Plaintiff,

v.

Lincoln County
Nos. 01 CRS 00011
(51 and 52)

JOSEPH MICHAEL PISCIOTTA
Defendant.

Appeal by defendant from judgments entered 12 April 2001 by Judge J. Gentry Caudill in Lincoln County Superior Court. Heard in the Court of Appeals 15 May 2002.

Attorney General Roy Cooper, by Assistant Attorney General George K. Hurst, for the State.

Mary March Exum for defendant appellant.

McCULLOUGH, Judge.

Defendant Joseph Michael Pisciotta was tried before a jury at the 10 April 2001 Criminal Session of Lincoln County Superior Court after being charged with one count of felonious breaking or entering and one count of felonious larceny. Evidence for the State showed that Mr. John Ayers was a vice president, construction manager, and part owner of Virginia Carolina Refractory, Inc. (Refractory), located in Denver, North Carolina. Between 5:00 and 6:00 p.m. on 21 December 2000, Mr. Ayers secured the premises and left the business. When he left, no one else was at the Refractory

and there was no damage to any of the building's doors and windows.

At 12:37 a.m. on 22 December 2000, Deputy Tyson Rogers of the Lincoln County Sheriff's Office was dispatched, and responded to a triggered alarm at Continental Coating, Inc., a business situated on Cross Point Drive near the Refractory. The businesses were one street apart, but both were accessible only by Townsend Drive. Deputy Rogers was traveling on Highway 16 and was approaching the intersection of Highway 16 and Townsend Drive when he saw a gray Jeep Cherokee with gold stripes and gold rims stopped at the intersection. Deputy Rogers noticed that the Jeep remained stationary, even though no cars were in the vicinity, and further noted it was unusual for cars to be coming out of Townsend Drive at night.

Deputy Rogers slowed as he approached the Jeep. When he was approximately fifteen yards away, he saw two individuals in the vehicle. As he turned right onto Townsend Drive, Deputy Rogers passed within five feet of the Jeep and noticed the driver was a white man wearing "an orange-ish or red-colored starter jacket, black toboggan." Deputy Rogers also testified the intersection was well lit and he was able to observe and make out the driver's features for five to ten seconds. Deputy Rogers later identified the driver as defendant. As Deputy Rogers continued on his way to Continental Coating, Inc., he called his partner, Deputy Christopher Kelly. Deputy Kelly was also responding to the alarm and was coming from the same direction as Deputy Rogers. Deputy Rogers described the Jeep to his partner and told him to stop it

for questioning. When Deputy Rogers arrived at Continental Coating, Inc., he discovered a window had been pried open and removed. He contacted Deputy Kelly again and informed him that a breaking or entering had occurred. Deputy Kelly called for back-up because he was still pursuing the Jeep.

Within two minutes of receiving Deputy Rogers' call, Deputy Kelly spotted the Jeep traveling north on Highway 16 at approximately 80-85 miles per hour. Deputy Kelly turned on his blue lights, tried to stop the Jeep, then engaged in a high-speed chase until the Jeep pulled into a driveway. As Deputy Kelly stopped, the two suspects exited the Jeep and fled on foot. Deputy Kelly got out of his car, pulled out his gun, and ordered the suspects to stop. The passenger continued running into the woods. The driver turned and looked directly at Deputy Kelly, then turned and ran into the woods. Deputy Kelly testified the driver was only fifteen feet away from him when he turned, and that the area was well lit by the Jeep's headlights and the patrol car's headlights, blue lights, and take-down lights. Deputy Kelly stated:

> In my opinion everything slowed down. As I saw it, I saw [sic] directly at him. Without a doubt I knew I could see his face. I saw him and I was pointing a gun at him, and he looked back, he looked forward, and he kept running.

Deputy Kelly chased the suspects for about thirty yards toward the edge of a wooded area. Deputy Kelly radioed for back-up. Additional officers arrived with K-9 units, but the suspects were not apprehended that night.

The officers searched the abandoned Jeep and found a pry bar, a 20-gauge shotgun, a chess set, a hand drill, a Nextel cellular phone, gloves, and various papers bearing defendant's name. The car was registered to Peggy Pisciotta, defendant's wife. Detective Sally Dellinger arrived on the scene, and inventoried, photographed, and took possession of the evidence. She was unable to take fingerprints, however, due to the cold temperature and moisture.

Around 5:00 a.m. on 22 December, Mr. Nick James arrived for work at the Refractory. Upon entering the office, he discovered the business had been broken into and ransacked. Mr. James called 911, then called his boss, Mr. Ayers. Officers discovered a window outside Mr. Ayers' office had been removed. Inside, the offices had been completely ransacked: Christmas presents were ripped open, drawers were open, and "[a]ll the stuff [was] thrown all over the place. The cases [were] open and the stuff [was] flipped over." Mr. Ayers and other employees at the Refractory reported the following items missing: a 20-gauge shotgun, a chess set, a collection of pocketknives, a coin collection, and petty cash. The only item belonging to the Refractory was the petty cash; all other items were the personal property of the Refractory's two vice presidents.

Sometime between 22 and 23 December, Deputy Kelly received a faxed photograph of defendant from the Division of Motor Vehicles. Deputy Kelly positively identified the man in the photograph as defendant, the driver of the Jeep.

Defendant presented evidence from Detective Ronnie Matthews of the Lincoln County Sheriff's Department. Detective Matthews testified that defendant was the only individual arrested for the break-ins, because while there was another suspect, officers were unable to develop sufficient probable cause to arrest him. Officers also did not search defendant's residence because there was a lack of probable cause. However, because two officers saw defendant in the Jeep and during the chase, there was sufficient probable cause to arrest him. Defendant also presented evidence from his wife and stepdaughter, who stated he was at home when the break-ins occurred. Defendant then rested.

After deliberating, the jury found defendant guilty of felonious breaking or entering and felonious larceny. The trial court determined defendant had a prior record level of IV and sentenced him to consecutive terms of 10-12 months' imprisonment for the felonious breaking or entering conviction and 10-12 months' imprisonment for the felonious larceny conviction. The trial court also recommended restitution to the Refractory in the amount of $478.00 if defendant was granted work release. Defendant appealed.

On appeal, defendant argues the trial court erred by (I) denying his motion to dismiss the charges against him because there was a fatal variance between the indictment and the State's evidence regarding ownership of the stolen items; (II) instructing the jury over his objection on the doctrine of recent possession; and (III) denying his motion to dismiss the charges at the close of the State's evidence because of insufficient evidence identifying

defendant as the perpetrator. For the reasons herein, we disagree with defendant's arguments and determine there was no error in his trial.

Fatal Variance

By his first assignment of error, defendant contends the trial court erred by denying his motion to dismiss the charges against him because there was a fatal variance between the indictment and the State's evidence regarding ownership of the stolen items. After careful examination of the record, we disagree.

The indictment in the present case states:

> I. The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above, the defendant named above unlawfully, willfully and feloniously did break and enter a building occupied by VIRGINIA CAROLINA REFRACTORY, INC. used as a BUSINESS located at 396 DOVE CT, DENVER, NC with the intent to commit a felony therein.
>
> II. And the jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully, and feloniously did steal, take and carry away A SHOTGUN, U.S. CURRENCY, COLLECTABLE COINS, KNIVES, CHESS SET, AND HAND CART the personal property of VIRGINIA CAROLINA REFRACTORY, INC. having a value of more than $1,000.00 dollars pursuant to the commission of felonious breaking and entering described in Count I above.

At the close of the State's evidence, defendant moved to dismiss the charges against him because the indictments showed the Refractory as the victim and owner of the items stolen when, in

reality, the Refractory was the owner of only the U.S. currency (petty cash), which was never recovered. Defendant argued the State's evidence showed that the other items were the personal property of Mr. Ayers and the Refractory's other vice president, Mr. Basinger. Defendant argues it is unclear whether the jury convicted him based on larceny of the petty cash or of larceny of the items recovered from the Jeep. Because the basis for conviction is unclear, defendant believes the trial court should have dismissed both charges and its failure to do so was reversible error.

An indictment is fatally defective when it charges the defendant with a crime against someone other than the actual victim. *State v. Abraham*, 338 N.C. 315, 340, 451 S.E.2d 131, 144 (1994). If a victim is misidentified in the indictment, the State is required "to prove injury to someone other than the true victim[.]" *Id.* If the indictment is fatally defective, "the trial court should dismiss the charge stemming from the flawed indictment and grant the State leave to secure a proper bill of indictment." *Id.* at 341, 451 S.E.2d at 144.

> [T]he general law has been that the indictment in a larceny case must allege a person who has a property interest in the property stolen and that the State must prove that that person has ownership, meaning title to the property or some special property interest. If the person alleged in the indictment to have a property interest in the stolen property is not the owner or special owner of it, there is a fatal variance entitling defendant to a nonsuit.

State v. Greene, 289 N.C. 578, 584-85, 223 S.E.2d 365, 369-70

(1976) (citations omitted). If the entity named in the indictment is not a person, it must be "a legal entity capable of owning property[.]" *State v. Woody*, 132 N.C. App. 788, 790, 513 S.E.2d 801, 803 (1999). Moreover,

> [i]t is not always necessary that the indictment allege the actual owner. It is generally stated as the rule that no fatal variance exists when the indictment names an owner of the stolen property and the evidence discloses that that person, though not the owner, was in lawful possession of the property at the time of the offense. . . . It is sometimes said also that more than mere lawful possession is required; that the person holding the property must have a special property interest in it, as by being a bailee[.]

State v. Liddell, 39 N.C. App. 373, 374-75, 250 S.E.2d 77, 78-79, *cert. denied*, 297 N.C. 178, 254 S.E.2d 36 (1979).

Here, the State relies on a bailment as the special property interest. A "bailment" has been defined as

> [a] delivery of goods or personal property, by one person (bailor) to another (bailee), in trust for the execution of a special object upon or in relation to such goods, beneficial either to the bailor or bailee or both, and upon a contract, express or implied, to perform the trust and carry out such object, and thereupon either to redeliver the goods to the bailor or otherwise dispose of the same in conformity with the purpose of the trust. The bailee is responsible for exercising due care toward the goods.

Black's Law Dictionary 141-42 (6th ed. 1991). This traditional definition, describing bailments as agreements arising in contract, is not the only definition of a bailment. Most commentators seem to follow the definition propounded by Professor Williston, which

defines a bailment broadly as the rightful possession of goods by one who is not the owner. 4 Samuel Williston, *Law of Contracts* § 2888 (Rev. ed. 1936).

In the present case, Mr. Ayers, one of the Refractory's two vice presidents, and a part owner, testified he and his partner offered the Refractory's employees and officers the chance to store personal property at the business rather than make the employees obtain a commercial storage unit.

> We have some storage area upstairs above the offices, and there are a lot of personal effects of all the employees that are up there. We just have room to store some items up there.

This testimony establishes the elements of a bailment. The chess set was owned by Mr. Basinger, a vice president and part owner of the Refractory. He kept the chess set on a pedestal in his office to enhance the appearance of the corporate premises, which benefited the corporation.

> The purpose of the requirement that ownership be alleged is to (1) inform defendant of the elements of the alleged crime, (2) enable him to determine whether the allegations constitute an indictable offense, (3) enable him to prepare for trial, and (4) enable him to plead the verdict in bar of subsequent prosecution for the same offense.

Greene, 289 N.C. at 586, 223 S.E.2d at 370. Whether the property was owned by the corporation or by individuals does not affect these four elements.

Finally, we note that the petty cash was clearly owned by the corporation. The actual amount of money stolen does not matter in

this case, because the amount is not an element of either breaking or entering or felonious larceny. Defendant was convicted of breaking or entering under N.C. Gen. Stat. § 14-54(a) (2001), which states:

> (a) Any person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon.

Defendant was also convicted of felonious larceny under N.C. Gen. Stat. § 14-72(b)(2) (2001) which states:

> (b) The crime of larceny is a felony, without regard to the value of the property in question, if the larceny is
>
> . . . .
>
> (2) Committed pursuant to a violation of . . . G.S. 14-54[.]

Therefore, defendant's convictions for both crimes may be predicated upon the larceny of the petty cash alone. Defendant's first assignment of error is overruled.

Doctrine of Recent Possession

By his second assignment of error, defendant argues the doctrine of recent possession does not apply to the charge of breaking or entering because he did not have exclusive dominion over the property stolen. He further maintains the State's evidence was weak, and nonsuit should have been granted. We disagree.

The doctrine of recent possession is a rule of law which states that possession of recently stolen property raises a

presumption of the possessor's guilt of the larceny of such property. *State v. Bell*, 270 N.C. 25, 30, 153 S.E.2d 741, 745 (1967). Moreover,

> [t]he presumption that the possessor is the thief which arises from the possession of stolen goods is a presumption of fact and not of law, and is strong or weak as the time elapsing between the stealing of the goods and the finding of them in the possession of the defendant is short or long. This presumption is to be considered by the jury merely as an evidential fact, along with the other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt. The duty to offer such explanation of his possession as is sufficient to raise in the minds of the jury a reasonable doubt that he stole the property, or the burden of establishing a reasonable doubt as to his guilt, is not placed on the defendant, however recent the possession by him of the stolen goods may have been. The burden of establishing the defendant's guilt beyond a reasonable doubt remains upon the State at all stages of the trial.

State v. Baker, 213 N.C. 524, 526, 196 S.E.2d 829, 830-31 (1938). *See also State v. Williams*, 219 N.C. 365, 13 S.E.2d 617 (1941).

> In summary then, the presumption spawned by possession of recently stolen property arises when, and only when, the State shows beyond a reasonable doubt: (1) the property described in the indictment was stolen; (2) the stolen goods were found in defendant's custody and subject to his control and disposition to the exclusion of others though not necessarily found in defendant's hands or on his person so long as he had the power and intent to control the goods; and (3) the possession was recently after the larceny, mere possession of stolen property being insufficient to raise a presumption of guilt.

State v. Maines, 301 N.C. 669, 674, 273 S.E.2d 289, 293 (1981)

(citations omitted). Defendant contends there were two suspects in the Jeep, and it was not clear who had possession of the items found in the vehicle. To find that he was in sole possession, defendant argues, was to rely on "stacked inferences," which is impermissible under *Maines*. *Id.* at 676, 273 S.E.2d at 294.

The State argues that all three elements necessary to invoke the doctrine of recent possession were present. First, the State maintains the property described in the indictment was shown beyond a reasonable doubt to be stolen. Mr. Ayers and Mr. James testified the shotgun and the chess set were present at the Refractory prior to 22 December 2000 and were not present the morning after the break-in at the business. Mr. Ayers positively identified both the chess set and the shotgun when they were shown to him by detectives.

Second, the State maintains the stolen goods were found in defendant's possession and subject to his control and disposition to the exclusion of others. *Maines*, 301 N.C. at 674, 273 S.E.2d at 293. Deputy Rogers saw the Jeep in the immediate vicinity of the Refractory within minutes of the Continental Coating, Inc.'s alarm being sounded. Deputy Rogers was in a well-lit area and positively identified defendant as the driver of the Jeep. Moments later, Deputy Kelly began pursuing the Jeep and did so until it stopped in a driveway. The driver of the Jeep looked back at Deputy Kelly after he was told to stop, and Deputy Kelly was able to positively identify defendant as the driver. The Jeep was registered to defendant's wife, and the shotgun and chess set from the Refractory

were found in the Jeep. The "exclusive possession" required to support an inference or presumption of guilt need not be sole possession, but may be joint. *Maines*, 301 N.C. at 675, 273 S.E.2d at 294. On the possession requirement, the *Maines* Court stated:

> For the inference to arise where more than one person has access to the property in question, the evidence must show the person accused of the theft had complete dominion, which might be shared with others, over the property or other evidence which sufficiently connects the accused person to the crime or a joint possession of co-conspirators or persons acting in concert in which case the possession of one criminal accomplice would be the possession of all. Stated differently, for the inference to arise, the possession in defendant must be to the exclusion of all persons not party to the crime.

Maines, 301 N.C. at 675, 273 S.E.2d at 294. Here, both Deputy Rogers and Deputy Kelly saw two people in the Jeep. Though only defendant was identified, both officers unequivocally stated defendant was the driver of the Jeep. The two businesses broken into on 21 or 22 December 2000 were situated in close proximity to one another; moreover, both were infiltrated by removal of a window. When inventoried shortly after the high-speed chase, the Jeep contained a pry bar and a hand drill. Both defendant and the other occupant of the Jeep were near the businesses when first noticed by officers, and both fled when the Jeep stopped after the high-speed chase.

Based on these facts, we conclude the offenses were committed in a manner indicating a shared or common purpose between the two occupants of the Jeep, and the facts are sufficient to show a

conspiracy or acting in concert. The State maintains there is sufficient direct evidence to support the inferences needed to establish a conspiracy or acting in concert (thereby avoiding an impermissible "stacking of inferences"). *See State v. Diaz*, 317 N.C. 545, 552, 346 S.E.2d 488, 493 (1986).

Finally, the State maintains the possession of the stolen items occurred shortly after the larceny, and amounted to more than "mere possession" of the items. Deputy Rogers responded within a few minutes to the alarm at Continental Coating, Inc., and clearly saw the Jeep and defendant on his way to the call. Moments later, Deputy Rogers contacted Deputy Kelly, who quickly located the Jeep and engaged in a high-speed chase with it. The Jeep was inventoried and photographed shortly after the chase, and the stolen items from the Refractory were found inside. Mr. Ayers testified he was at the Refractory until 5:00 p.m. or 6:00 p.m. on 21 December 2000, and the items were there when he left the business.

Based on this sequence of events, it is reasonable to surmise that the items were stolen sometime after Mr. Ayers locked the business on 21 December 2000, but before 1:00 a.m. on 22 December 2000. At most, the amount of time that could have elapsed was seven and one-half hours; this satisfies the "recency" aspect of the doctrine of recent possession. We conclude the State proved the elements of recent possession and was entitled to an instruction on the doctrine. Defendant's second assignment of error is overruled.

Motion to Dismiss

By his final assignment of error, defendant contends the trial court erred in denying his motion to dismiss based on insufficient evidence. Specifically, defendant contends the State provided insufficient evidence of defendant's identity as the perpetrator. We disagree.

"In ruling upon a motion to dismiss, the trial court must determine whether, 'upon consideration of all of the evidence in the light most favorable to the State, there is substantial evidence that the crime charged . . . was committed and that defendant was the perpetrator.'" *State v. Beasley*, 118 N.C. App. 508, 511-12, 455 S.E.2d 880, 883 (1995) (quoting *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990)). *See also State v. Smith*, 130 N.C. App. 71, 78, 502 S.E.2d 390, 395 (1998). Whether evidence presented constitutes substantial evidence is a question of law for the Court. *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991).

The State argues that defendant has conceded the crimes were committed and challenges only the State's identification of him as the perpetrator. The State further argues there is substantial evidence of each essential element of the offense charged and of defendant being the perpetrator of the offense.

Though defendant characterizes this assignment of error in

terms of the motion to dismiss, it should be noted that the trial court denied defendant's motions to suppress the identification testimony of Deputy Rogers and Deputy Kelly. However, defendant attacks the sufficiency and reliability of the identification evidence as grounds for his motion to dismiss. The standard of review on a motion to suppress differs from the standard of review on a motion to dismiss. On a motion to suppress, findings of fact not excepted to on appeal are not reviewable. *State v. Watkins*, 337 N.C. 437, 438, 446 S.E.2d 67, 68 (1994). The trial court's findings of fact and resolution of conflicts in the evidence will not be disturbed on appeal unless they are not supported by the evidence. *State v. Brewington*, 352 N.C. 489, 498-99, 532 S.E.2d 496, 501-02 (2000), *cert. denied*, 531 U.S. 1165, 148 L. Ed. 2d 992 (2001). "Once this Court concludes that the trial court's findings of fact are supported by the evidence, then this Court's next task 'is to determine whether the trial court's conclusion[s] of law [are] supported by the findings.'" *State v. Steen*, 352 N.C. 227, 237, 536 S.E.2d 1, 7-8 (2000), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001) (quoting *State v. Hyde*, 352 N.C. 37, 45, 530 S.E.2d 281, 288 (2000), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001)).

Here, the trial court made verbal findings of fact and conclusions of law in open court. The trial court concluded both officers made in-court identifications of defendant based solely on what each officer saw on 22 December 2000. The trial court also noted the officers had ample opportunity to view defendant, were

paying close attention to defendant's face, and expressed high levels of certainty regarding their identification of defendant as the perpetrator of the crimes. Finally, the trial court concluded that the showing of defendant's photograph was not so suggestive as to be conducive to irreparable mistaken identity and to offend fundamental standards of decency, fairness and justice.

We note defendant abandoned his three assignments of error regarding the motion to suppress the identification evidence. *See* N.C.R. App. P. 28(b)(5) (2001). We conclude the trial court did not err in denying defendant's motion to dismiss for insufficient evidence. However, even if defendant's assignments of error regarding the motion to suppress the identification evidence are not deemed abandoned, the officers' identification of defendant as the perpetrator of the crimes was reliable and supported by the facts.

"Identification evidence must be excluded as violating a defendant's right to due process where the facts reveal a pretrial identification procedure so impermissibly suggestive that there is a very substantial likelihood of irreparable misidentification." *State v. Harris,* 308 N.C. 159, 162, 301 S.E.2d 91, 94 (1983). "First, the Court must determine whether the pretrial identification procedures were unnecessarily suggestive. If the answer to this question is affirmative, the court then must determine whether the unnecessarily suggestive procedures were so impermissibly suggestive that they resulted in a substantial likelihood of irreparable misidentification." *State v. Fisher*, 321

N.C. 19, 23, 361 S.E.2d 551, 553 (1987). *See also State v. Pigott*, 320 N.C. 96, 99, 357 S.E.2d 631, 633 (1987). "Whether a substantial likelihood exists depends on the totality of the circumstances." *Fisher*, 321 N.C. at 23, 361 S.E.2d at 553.

> The factors to be considered . . . include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

Manson v. Brathwaite, 432 U.S. 98, 114, 53 L. Ed. 2d 140, 154 (1977).

When determining the credibility of a witness' identification testimony, the test is whether "'"there is a reasonable possibility of observation sufficient to permit subsequent identification."'" *Smith*, 130 N.C. App. at 78, 502 S.E.2d at 395 (quoting *State v. Turner*, 305 N.C. 356, 363, 289 S.E.2d 368, 372 (1982) (citation omitted)). In the present case, the trial court concluded the officers had ample opportunity to observe defendant and later identify him. As the evidence supports the trial court's findings of fact and conclusions of law on this issue, we conclude the trial court did not err in denying defendant's motion to dismiss based on insufficient evidence. Accordingly, defendant's final assignment of error is overruled.

After careful examination of the record and the arguments presented by the parties, we conclude defendant received a fair

trial, free from error.

No error.

Judges WALKER and BRYANT concur.

Report per Rule 30(e).