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NO. COA08-753

NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2009

STATE OF NORTH CAROLINA

v.

JAMES HOWARD ROWLAND

Harnett County  
Nos. 06 CRS 57619  
07 CRS 6932

Appeal by defendant from judgments entered on or after 9 April 2008 by Judge Ota M. Lewis in Harnett County Superior Court. Heard in the Court of Appeals 14 January 2009.

*Attorney General Roy Cooper, by Assistant Attorney General Joseph F. Elder, for the State*  
**Slip Opinion**  
*Robert W. Ewing for defendant-appellant.*

HUNTER, JR., Robert N., Judge.

James Howard Rowland ("defendant") appeals judgments entered after a jury found him guilty of: (1) felonious breaking and entering pursuant to N.C. Gen. Stat. § 14-54(a); (2) felonious larceny pursuant to N.C. Gen. Stat. § 14-72(a); (3) felonious possession of stolen goods pursuant to N.C. Gen. Stat. § 14-72(c); (4) safecracking pursuant to N.C. Gen. Stat. § 14-89.1; and (5) being an habitual felon pursuant to N.C. Gen. Stat. § 14-7.1. We hold there to be no error in part and vacate in part.

I. Background

On 23 December 2006, Lieutenant Steve Freeman ("Lieutenant Freeman") of the Lillington Police Department was on foot patrol in Lillington. At approximately 1:30 a.m., Lieutenant Freeman noticed a woman "standing on the corner of James and 8th." Lieutenant Freeman then observed the woman run towards Carter's Economy Cleaners Inc.

As Lieutenant Freeman approached Carter's Economy Cleaners, he heard a "hitting noise" inside the business. Lieutenant Freeman testified that the noise "[s]ounded as if something was -- hitting metal." Lieutenant Freeman called for backup and asked his dispatch to have a keyholder respond to his location.

While Lieutenant Freeman and the backup officers waited for a keyholder to respond, the noise stopped. Lieutenant Freeman testified that five or ten minutes after the noise stopped, a window opened, and a man, later identified as defendant, attempted to exit through the window. Lieutenant Freeman ordered defendant to stop, but defendant went back inside.

Lieutenant Freeman ordered one of the backup officers to kick in the door. Once the door was kicked in, Lieutenant Freeman released his K-9 into the building. The K-9 apprehended defendant and the officers arrested him. Lieutenant Freeman testified that a safe was in the middle of the floor with its back open, a pickaxe was on the floor next to the desk defendant was found hiding under, and defendant had change and two-dollar bills in his pockets.

Defendant was indicted for: (1) felonious breaking and entering; (2) felonious larceny; (3) felonious possession of stolen

goods; (4) safecracking; and (5) attaining habitual felon status. On 9 April 2008, a jury found defendant guilty of all charges. The trial court arrested judgment on defendant's felonious possession of stolen goods conviction, determined defendant to be a prior record level V offender, and sentenced defendant to 3 consecutive terms of a minimum of 151 to a maximum of 191 months' incarceration. Defendant appeals.

### II. Issues

Defendant argues the trial court erred when it: (1) allowed the prosecutor to present evidence that defendant did not waive his *Miranda* rights; (2) denied his motion to dismiss the charge of safecracking; and (3) sentenced him as a prior record level V offender for his safecracking conviction. Defendant also argues he received ineffective assistance of counsel based on his counsel's failure to object to the sentencing error.

### III. *Miranda* Rights

Defendant argues the trial court erred when it allowed the prosecutor to present evidence that defendant did not waive his *Miranda* rights. We disagree.

"[W]hen a person under arrest has been advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694 (1966), which includes the right to remain silent, there is an implicit promise that the silence will not be used against that person." *State v. Hoyle*, 325 N.C. 232, 236, 382 S.E.2d 752, 754 (1989) (citing *Doyle v. Ohio*, 426 U.S. 610, 49 L. Ed. 2d 91 (1976)). Our Supreme Court has recognized that a defendant's right

to not have their silence used against them is violated in "cases in which 'the trial court has permitted specific inquiry or argument respecting the defendant's post-Miranda silence.'" *State v. Carter*, 335 N.C. 422, 432, 440 S.E.2d 268, 273 (1994) (quoting *Greer v. Miller*, 483 U.S. 756, 764, 97 L. Ed. 2d 618, 629, *reh'g denied*, 483 U.S. 1056, 97 L. Ed. 2d 819 (1987)).

Here, the following exchange occurred between the prosecutor and Detective Steve Brewington ("Detective Brewington") at trial:

Q Detective Brewington, I had asked you about interacting with the defendant. You stated that you had asked him his name.

A Yes.

. . . .

Q After you received information from the defendant, what did you do?

A I proceeded to read him his Miranda rights in order to further interview him.

Q And after you provided the Miranda rights, what did you do next?

A I asked him if he understood those rights and if he wanted to waive those rights, which he did not.

[Defense Counsel]: Objection.

THE COURT: That's okay. He has the right not to waive. Overruled. Go ahead.

It appears from the transcripts that the information regarding defendant's silence was inadvertently allowed. The prosecutor's direct examination did not lead or suggest the answer Detective Brewington offered that defendant exercised his right to remain silent. The trial court's comments minimized any potential

prejudice. Detective Brewington only testified that defendant was read his rights and chose not to waive them. The prosecutor did not further inquire, make any comment, or jury argument about defendant's exercise of his right to remain silent. Defendant's exercise of his right to remain silent was therefore not used against him, and his constitutional rights were not violated. This assignment of error is overruled.

#### IV. Motion to Dismiss

Defendant argues the trial court erred when it denied his motion to dismiss the charge of safecracking because there was a fatal variance between the evidence at trial and the allegations in the indictment. We agree.

In *State v. Watson*, our Supreme Court reversed a defendant's safecracking conviction based on a fatal variance between the indictment and proof offered at trial. 272 N.C. 526, 527, 158 S.E.2d 334, 335 (1968). Our Supreme Court stated:

The indictment charged that the defendant forced open "a safe of R. C. H. Harriss." The State's evidence shows that the cabinet forced open on the occasion in question was the property of Harriss-Conners Chevrolet, Inc. This was a fatal variance between the offense charged in the indictment and the proof. *State v. Brown*, 263 N.C. 786, 140 S.E. 2d 413; *State v. Stinson*, 263 N.C. 283, 139 S.E. 2d 558. "It is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment. The allegation and proof must correspond." *State v. Jackson*, 218 N.C. 373, 11 S.E. 2d 149. "In indictments for injuries to property it is necessary to lay the property truly, and a variance in that respect is fatal." *State v. Mason*, 35 N.C. 341.

*Id.* Our Supreme Court went on to note that “[t]he solicitor may, if so advised, present another bill of indictment correctly alleging the ownership of the container which he contends was forced open in violation of [N.C. Gen. Stat. § 14-89.1].” *Id.*; see also *State v. Abraham*, 338 N.C. 315, 341, 451 S.E.2d 131, 144 (1994) (“Where the indictment and the proof are at variance, as is the case here, the trial court should dismiss the charge stemming from the flawed indictment and grant the State leave to secure a proper bill of indictment.” (citing *State v. Overman*, 257 N.C. 464, 468, 125 S.E.2d 920, 924 (1962) and *State v. Bell*, 270 N.C. 25, 29, 153 S.E.2d 741, 745 (1967))).

Here, the indictment alleged defendant “attempt[ed] to enter a safe which was the property of Carter’s Economy Cleaners, Inc. . . . by means of the use of tools.” At trial, the State’s evidence showed that Gary and Margie Carter, the owners of Carter’s Economy Cleaners Inc., owned the safe individually.

Based on our Supreme Court’s holding in *Watson*, we hold the variance between the indictment and the State’s offer of proof to be fatal. 272 N.C. at 527, 158 S.E.2d at 335. The trial court erred when it denied defendant’s motion to dismiss the charge of safecracking. Defendant’s conviction and sentence for safecracking in case file 06 CRS 57619 is vacated.

In light of our holding, it is unnecessary to review defendant’s remaining assignments of error.

#### V. Conclusion

The prosecutor neither solicited nor commented on Detective Brewington's statement that defendant did not waive his *Miranda* rights. Defendant's exercise of his right to remain silent was not used against him and his constitutional rights were not violated.

The variance between the indictment and the State's offer of proof at trial was fatal. The trial court erred when it denied defendant's motion to dismiss the charge of safecracking. The judgment entered on defendant's safecracking conviction is vacated. We hold there to be no error in defendant's remaining convictions or the judgments entered thereon.

No error in part; vacated in part.

Judges McGEE and JACKSON concur.

Report per Rule 30(e).