NO. COA14-321

NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

STATE OF NORTH CAROLINA

v. New Hanover County
Nos. 11CRS053139, 11CRS053693, 11CRS053740

BILLY FRANK LARKIN,
Defendant.

Appeal by defendant from judgments entered on or about 19 September 2013 by Judge W. Allen Cobb, Jr. in Superior Court, New Hanover County. Heard in the Court of Appeals 9 September 2014.

Attorney General Roy A. Cooper, III by Assistant Attorney General John F. Oates, Jr., for the State.

Brock & Meece, P.A. by C. Scott Holmes, for defendant-appellant.

STROUD, Judge.

Billy Frank Larkin ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of two counts of first-degree burglary, felonious larceny pursuant to burglary, felonious breaking or entering, and felonious larceny after breaking or entering, offenses arising from three separate incidents. Defendant argues that the trial court erred by (1)

denying his motion to suppress evidence that resulted from a search of his vehicle; (2) instructing the jury on the doctrine of recent possession with respect to one of the incidents; and (3) denying his motion to sever the cases into three trials. Defendant also contends that insufficient evidence supports his convictions arising from one of the incidents. We find no error.

I. Background

A. Johnson Incident

Around 5:00 pm on 5 November 2010, Robbie Johnson left his photography equipment on a couch in his Carolina Beach condominium. This photography equipment included a 500 millimeter lens, a 70 to 200 millimeter lens, a 17 to 40 millimeter lens, and a Mark II-N camera. The following morning, on 6 November 2010, Johnson discovered that his photography equipment was missing from his condominium. That day, defendant sold a 500 millimeter lens, a 70 to 200 millimeter lens, a 17 to 40 millimeter lens, and a Mark II-N camera to a camera store in Raleigh.

On 8 November 2013, Johnson visited the Raleigh camera store after discovering that it had recently acquired photography equipment matching the description of his missing property. Johnson brought registration cards that contained the

missing items' serial numbers. Johnson and the store manager discovered that the serial numbers of the photography equipment sold by defendant matched Johnson's serial numbers. The camera store returned all four items to Johnson.

B. Breese Incident

On 7 November 2010, Nancy Breese left her Bose CD changer and radio on a chest in her Kure Beach house. Breese earlier had recorded the serial numbers associated with the Bose CD changer and radio. Breese went to bed that night around 9:00 p.m. During the middle of the night, Breese heard noises and yelled, thinking it was her cat. When Breese rose from bed the next morning, she immediately noticed that her Bose CD changer and radio were missing.

On 7 April 2011, in an investigation unrelated to the Breese incident, police officers conducted a search of defendant's hotel room in Fayetteville and discovered a Bose CD changer and radio. The serial numbers of the Bose CD changer and radio matched the serial numbers recorded by Breese.

C. Madsen Incident

Around 11:00 p.m. on 7 November 2010, Don Madsen went to bed in his Carolina Beach condominium. Around 3:00 a.m., Madsen woke up and saw the shadow of a person. Madsen yelled, jumped

out of bed, and chased the intruder. The intruder ran away from Madsen and onto Madsen's balcony, and Madsen pursued the intruder until he jumped off of Madsen's balcony and ran out of sight. Madsen did not get a good look at the intruder.

Madsen noticed that an envelope containing a set of keys was missing from his condominium. Madsen also noticed a pair of tennis shoes on his patio that were not his. One of the shoes had a car key tied in its laces. At 12:15 p.m. on 8 November 2010, Detective Humphries of the Carolina Beach Police Department ("CBPD") discovered a shoeprint in some sand outside Breese's house that, in his lay opinion, matched the soles of the shoes found on Madsen's patio.

D. Search of Defendant's Corvette

In April 2011, the Wrightsville Beach Police Department ("WBPD") seized defendant's Corvette in Fayetteville and transported it to an impound lot in Wilmington. This seizure was unrelated to any of the incidents described above. Officer James Carl Mobley told Detective Humphries that, while working for the WBPD, he had encountered defendant and remembered that defendant had worn a pair of tennis shoes with a Corvette key interlaced in his right shoe. On or about 20 April 2011, Detective Humphries obtained a search warrant for defendant's

Corvette based upon information that he had received from the WBPD, and he tried the car key that had been interlaced in one of the shoes left on Madsen's patio in the seized Corvette. The key fit the Corvette, thus linking defendant to the key found in the shoes.

E. Course of Proceedings

On or about 27 June 2011, a grand jury indicted defendant for felonious breaking or entering and felonious larceny after breaking or entering in connection with the Johnson incident, first-degree burglary and felonious larceny pursuant to burglary in connection with the Breese incident, and first-degree burglary in connection with the Madsen incident. On or about 13 September 2013, defendant moved to suppress evidence resulting from the CBPD's search of his Corvette. On or about 14 September 2013, defendant moved to sever the charges into three trials. On 4 October 2013, *nunc pro tunc* for 16 September 2013, the trial court denied (1) defendant's motion to suppress after concluding that the State had proved that the CBPD would have inevitably discovered defendant's Corvette; and (2) defendant's motion to sever after finding that all three incidents occurred within a three-day span, within 2.5 miles of each other, and

involved breaking into a personal beachfront residence to commit a larceny.

Defendant renewed his pretrial motion to sever during jury selection, and the trial court again denied it. At the close of all the evidence, defendant moved to dismiss all charges. The trial court denied the motion. On or about 19 September 2013, a jury found defendant guilty of all charges. The trial court sentenced defendant to two consecutive terms of 85 to 111 months' imprisonment. Defendant gave notice of appeal in open court.

II. Admission of Evidence

A. Standard of Review

Defendant first contends that the trial court committed plain error in admitting evidence obtained from the CBPD's search of defendant's Corvette. Although defendant moved to suppress this evidence before trial, defendant failed to object to its admission at trial and thus failed to preserve error. *See State v. Stokes*, 357 N.C. 220, 227, 581 S.E.2d 51, 56 (2003). But we may review for plain error the denial of a defendant's pretrial suppression motion, if the defendant specifically and distinctly argues on appeal that the trial court committed plain error. *State v. Harwood*, ___ N.C. App. ___, ___, 727 S.E.2d 891,

896 (2012) (citing N.C.R. App. P. 10(a)(4)); *Stokes*, 357 N.C. at 227, 581 S.E.2d at 56.

> For an appellate court to find plain error, it must first be convinced that, "absent the error, the jury would have reached a different verdict." *State v. Reid*, 322 N.C. 309, 313, 367 S.E.2d 672, 674 (1988) (citation omitted). "The defendant has the burden of showing that the error constituted plain error." *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997).

State v. Wade, 213 N.C. App. 481, 493, 714 S.E.2d 451, 459 (2011), *disc. rev. denied*, 366 N.C. 228, 726 S.E.2d 181 (2012).

Thus, on plain error review, the defendant must first demonstrate that the trial court committed error, and next "that absent the error, the jury probably would have reached a different result." *State v. Haselden*, 357 N.C. 1, 13, 577 S.E.2d 594, 602, *cert. denied*, 540 U.S. 988, 157 L.Ed. 2d 382 (2003). So, if the defendant has failed to show that the purported error would have led to a different result, we need not consider whether an error was actually made.

Here, apart from Detective Humphries' lay opinion that a shoeprint outside Breese's house matched the shoes left on Madsen's patio, the only evidence that links defendant to the Madsen incident is the evidence that the key found in the shoe operated defendant's Corvette. It is probable that had this

evidence been suppressed, the jury would have reached a different result; thus, we must consider whether the trial court's denial of defendant's suppression motion and admission of this evidence was in error. *See Wade*, 213 N.C. App. at 493, 714 S.E.2d at 459.

"The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011). Conclusions of law are reviewed *de novo*. *Id.* at 168, 712 S.E.2d at 878.

The trial court made the following findings of fact:

> 1. On November 8, 2010, Detective Harry Humphries was employed by the Carolina Beach Police Department as Senior Detective.
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> 2. On November 8, 2010 Detective Humphries was assigned a burglary case that occurred in Carolina Beach.
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> 3. During the course of that investigation a pair of tennis shoes and a key, interlaced in the shoes, were seized from the scene of the burglary. At the time of the crime, there were no known suspects.
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> 4. Detective Humphries determined through conversations with Jeff Gordon Chevrolet that the key was for a Chevrolet Corvette.
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> 5. Officer Mobley was hired by the Carolina Beach Department in late 2010 while

at the same time working as a sworn reserve officer with the Wrightsville Beach Police. He was not assigned to work the November 8, 2010 burglary.

6. In April 2011, Officer Mobley was assigned to the CID unit of the Carolina Beach Police Department for two weeks as part of a new hire training program.

7. During that two week time, Detective Humphries had a conversation with Officer Mobley in which Officer Mobley told Detective Humphries that he was involved in the arrest of Billy Larkin.

8. Officer Mobley told Detective Humphries that at the time of Billy Larkin's arrest, Mr. Larkin was wearing a pair of tennis shoes with a Corvette key interlaced in the right shoe.

9. Officer Mobley told Detective Humphries that he escorted Billy Larkin to the location where his Corvette was located and Billy Larkin took the key out of the laces and opened the Corvette with said key.

10. The State of North Carolina stipulated that in April 2011, Wrightsville Beach Police Department was conducting a parallel investigation of Bill[y] Larkin for burglaries and seized Billy Larkin's 2000 Chevrolet Corvette in violation of the 4th Amendment of the U.S. Constitution from his residence in Fayetteville, North Carolina.

11. As a result of the seizure, Wrightsville Beach Police Department brought the vehicle from Fayetteville, North Carolina to Wilmington, NC and stored it at a local impound lot.

12. Carolina Beach Police Department did

> not assist or have any connection to the seizure of the vehicle and did not have knowledge of the seizure, at the time it was seized.
>
> 13. On April 20, 2011, based upon information received from Officer Mobley as to the observations of Billy Larkin, the type of Corvette he drove, the similar types of cases being investigated by Wrightsville Beach Police Department, and the location of the vehicle at the impound lot, Detective Humphries applied for and received a search warrant for Billy Larkin's 2000 Chevrolet Corvette, Georgia registration ACM 4256.
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> 14. Detective Humphries did not rely on any evidence, if any, gathered by Wrightsville Beach Police Department as a result of their illegal seizure, to procure his search warrant.
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> 15. Detective Humphries testified he would have applied for the search warrant no matter if the vehicle was seized by Wrightsville Beach Police Department. Furthermore, if the vehicle was not in Wilmington, NC he would have gone to look for it no matter the location.
>
> 16. During the course of the search, it was determined that the key Carolina Beach Police seized from the November 8, 2010 burglary matched the 2000 Chevrolet Corvette, Georgia Registration ACM 4256 owned by Billy Larkin.

Based on these findings of fact, the trial court made several conclusions of law including the following:

> 4. The inevitable discovery exception can be applied in this case.

5. Detective Humphries conducted an independent investigation and procured a search warrant, the validity of which was never questioned in this case, based upon untainted evidence received from Officer Mobley.

6. Officer Mobley came in contact with Billy Larkin in Wrightsville Beach prior to the seizure of the vehicle. He made his observations about Billy Larkin's shoes, interlaced key, the 2000 Chevrolet Corvette, and the fact that the key in possession of Billy Larkin fit the 2000 Chevrolet Corvette prior to the seizure of that vehicle.

7. Detective Humphries did not rely on any evidence, if any, gathered by Wrightsville Beach Police Department as a result of their illegal seizure, to procure his search warrant.

8. Detective Humphries did rely on information from Officer Mobley as to the location of the vehicle.

9. Detective Humphries would have applied for the search warrant no matter if the vehicle was seized by Wrightsville Beach Police Department. Furthermore, if the vehicle was not in Wilmington, NC, he would have gone to look for it no matter the location.

10. Based on the preponderance of evidence, the information gained from Detective Humphries' search of the 2000 Chevrolet Corvette owned by Bill[y] Larkin ultimately or inevitably would have been discovered by lawful means, and as therefore should be admissible.

Defendant did not challenge the validity of Detective Humphries' search warrant at the trial court. Although defendant contends on appeal that he challenged the validity of the search warrant at the trial court, after examining the record, we determine that, although he challenged the constitutionality of Detective Humphries' search, he did not challenge the validity of Detective Humphries' search warrant. In other words, he did not challenge the issuance of the warrant itself or the information upon which it was based; he challenged the search only because the Corvette had been illegally seized by the WBPD before Detective Humphries executed the search warrant. We thus narrow our inquiry to whether the State proved inevitable discovery based on the information contained in Detective Humphries' search warrant and Detective Humphries' testimony that he would have searched for defendant's Corvette, no matter the location. *See State v. Smith*, 50 N.C. App. 188, 190, 272 S.E.2d 621, 623 (1980) ("The appellate court will not consider arguments based upon issues which were not presented or adjudicated by the trial tribunal.").

B. Inevitable Discovery Exception

Under the "exclusionary rule," evidence obtained from an unconstitutional search or seizure is generally inadmissible in

a criminal prosecution of the individual subjected to the constitutional violation. *State v. McKinney*, 361 N.C. 53, 58, 637 S.E.2d 868, 872 (2006). Likewise, under the "fruit of the poisonous tree doctrine," evidence that is the "fruit" of the unlawful conduct is also inadmissible. *Id.*, 637 S.E.2d at 872 (citing *State v. Pope*, 333 N.C. 106, 113-14, 423 S.E.2d 740, 744 (1992)).

But under the "inevitable discovery" exception, if the State can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful, independent means, then the information is admissible. *See State v. Garner*, 331 N.C. 491, 502, 417 S.E.2d 502, 508 (1992) (citing *Nix v. Williams*, 467 U.S. 431, 444, 81 L.Ed. 2d 377, 387-88 (1984)). The State need not prove an ongoing independent investigation; we use a flexible case-by-case approach in determining inevitability. *Id.* at 503, 417 S.E.2d at 508. If the State carries its burden, thus leaving the State in no better and no worse position than if it had not obtained the evidence unlawfully, we do not consider any question of good faith, bad faith, mistake, or inadvertence. *Id.* at 508, 417 S.E.2d at 511.

It is crucial in this case to distinguish between the information that the CBPD had about defendant's Corvette prior to the execution of the search warrant and the information derived from the search itself. The only important information derived from the actual search—trying the key found on the Madsen patio in the ignition of the Corvette—was that the key operated that Corvette. The CBPD had all of the other information about the Corvette, including the fact that it belonged to defendant, prior to the execution of the search.

Defendant argues that the information regarding "[t]he identity, ownership and location of the vehicle came from the [WBPD] directly as a result of the unconstitutional seizure." Although it may have been possible for this information to have been derived from the illegal seizure, the evidence supports the trial court's findings of fact that this information was not derived from the illegal seizure of the vehicle. To the extent that there was any conflict in the evidence, the trial court resolved this conflict in favor of the State. Detective Humphries testified that he directly called the WBPD to get the registration information and VIN number. The parties stipulated that the WBPD's seizure of defendant's Corvette in Fayetteville, which arose from a separate investigation, violated the Fourth

Amendment. The trial court found that the CBPD did not participate in the unlawful seizure. The trial court also found that Detective Humphries of the CBPD did not rely on any evidence stemming from the WBPD's unlawful seizure in procuring his search warrant. The trial court further found that, had the WBPD not seized the Corvette, Detective Humphries would have applied for a search warrant and would have searched for the Corvette, no matter its location.

As noted above, defendant did not challenge the issuance of the search warrant itself[1]; defendant challenged only the information derived from the search, which was the fact that the key found on Madsen's patio matched defendant's Corvette. The basis for defendant's motion was that defendant's Corvette was located, at the time that the search warrant was issued, in the impound lot, instead of wherever it might have been if it had not been illegally seized. But, based upon the application for

[1] The Application for Search Warrant in the record appears to be incomplete, as the portion of the application as to the "facts to establish probable cause for the issuance of a search warrant" is cut off mid-sentence. The Application form, AOC-CR-119, Rev. 9/02, notes that "If more space is needed for any section, continue the statement on an attached sheet of paper with a notation saying 'see attachment.'" There is no notation of attachment or attachment in our record. But as defendant has not challenged the issuance of the search warrant itself, the incomplete application does not impair our review. The portion we have clearly identifies the defendant's Corvette.

the search warrant and the search warrant itself, the CBPD was seeking a "2000 CORVETTE BLACK IN COLOR GA. REG ACM 4256 BELONGING TO MR BILLY LARKIN." Based upon the record before us, the information provided by Officer Mobley about his investigation of defendant for other offenses, including the fact that defendant kept his Corvette key in his shoe strings and the identifying information about defendant and his Corvette, was not obtained from the illegal seizure of the Corvette.

These findings support the trial court's conclusion that the State proved inevitable discovery. *See Biber*, 365 N.C. at 167-68, 712 S.E.2d at 878. The State had the information identifying both defendant and his particular Corvette and was engaged in seeking that Corvette. Detective Humphries found the Corvette more quickly, since he learned that it was being held in the impound lot in Wilmington and he could execute the warrant there, but he would have done the same thing whether he found the car at defendant's home or if it was located elsewhere by law enforcement on the lookout for this particular vehicle.

Courts have previously considered a discovery of evidence as "inevitable" where the police have sufficient identifying information about the specific item sought and where it appears

that in the normal course of an investigation, the item would have been discovered even without the information that was obtained illegally. In *Garner*, pursuant to an unlawful search, police officers discovered the identity of the gun merchant who sold a certain gun. 331 N.C. at 497-98, 417 S.E.2d at 505. In response to the defendant's motion to suppress, the State proffered evidence that this gun merchant filed its sales with the Bureau of Alcohol, Tobacco, and Firearms ("ATF") and that police normally check ATF records after recovering a gun. *Id.* at 503-04, 417 S.E.2d at 509. Because the police had the gun's serial number and would have checked the ATF records had they not previously discovered the gun merchant's identity, the North Carolina Supreme Court held that the State had proved inevitable discovery. *Id.* at 504, 417 S.E.2d at 509.

In *State v. Juniper*, the Ohio Fifth Court of Appeals held that the State had proved that the police inevitably would have discovered the defendant's vehicle where police knew the make, model, identification number, and approximate year of the vehicle and the vehicle was located at the defendant's friend's home, about five to ten minutes from the defendant's home. 719 N.E.2d 1022, 1028-29 (Ohio Ct. App. 1998), *appeal dismissed*, 705 N.E.2d 1242 (Ohio 1999). Similarly, in *U.S. v. Halls*, the Eighth

Circuit held that the State had proved inevitable discovery where police had a complete description of the defendant's vehicle and knew the defendant's exact travel route. 40 F.3d 275, 277 (8th Cir. 1994), *cert. denied*, 514 U.S. 1076, 131 L.Ed. 2d 579 (1995).

Like the police in *Juniper* and *Halls*, the CBPD knew the make, model, registration number, and year of defendant's Corvette. Defendant did not counter with any evidence to suggest that the CBPD would not have easily discovered the Corvette at the time of the warrant's execution; on the contrary, earlier that month, the WBPD had seized defendant's Corvette at defendant's residence in Fayetteville. Suppressing the evidence would impermissibly place the State "in a *worse* position simply because of some earlier police error or misconduct." *See Nix*, 467 U.S. at 443, 81 L.Ed. 2d at 387. The State thus proved by a preponderance of the evidence that Detective Humphries, armed with the knowledge of the vehicle's make, model, registration number, and year, inevitably would have discovered defendant's Corvette.

Defendant's reliance on *State v. Wells* is misplaced. ___ N.C. App. ___, ___, 737 S.E.2d 179, 181 (2013). There, this Court held that the State failed to prove inevitable discovery

because it failed to proffer any supporting evidence. *Id.* at ___, 737 S.E.2d at 182. In contrast, here, the State proffered Detective Humphries' search warrant that contained a complete description of defendant's Corvette and Detective Humphries' testimony that he would have searched for the Corvette, no matter the location. We therefore find that *Wells* is distinguishable. Accordingly, we hold that the trial court did not err in denying defendant's motion to suppress or in its admission of the evidence at trial and thus also did not commit plain error.

III. Jury Charge

Defendant contends that the trial court erred in submitting a jury instruction on the doctrine of recent possession in connection with the Breese offenses. But the trial court did not submit this instruction in connection with the Breese offenses; rather, it submitted it in connection with the Johnson offenses. Defendant does not challenge the trial court's application of the doctrine of recent possession to the Johnson offenses. We therefore hold that the trial court did not commit error in the jury charge.

IV. Motion to Dismiss

A. Standard of Review

This Court reviews the trial court's denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion to dismiss, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L.Ed. 2d 150 (2000). "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). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L.Ed. 2d 818 (1995).

B. Analysis

In his argument that the jury charge contained error, defendant also contends that insufficient evidence supports his convictions arising from the Breese incident. Defendant moved to dismiss all charges at the close of all the evidence and thus

has preserved error to challenge the sufficiency of the evidence. *See* N.C.R. App. P. 10(a)(3).

In connection with the Breese incident, defendant was convicted of first-degree burglary and felonious larceny pursuant to burglary. Relying on *State v. Hamlet*, defendant contends that his possession of Breese's Bose CD changer and radio five months after they were stolen from Breese's house was insufficient to convict him of the Breese offenses. *See* 316 N.C. 41, 46, 340 S.E.2d 418, 421 (1986).

In *Hamlet*, the defendant possessed a stolen television, property that is "normally and frequently traded in lawful channels[,]" approximately thirty days after the television was discovered to have been stolen pursuant to a breaking or entering. *Id.* at 45, 340 S.E.2d at 421. The North Carolina Supreme Court held that this evidence alone was insufficient to support defendant's convictions of breaking or entering and larceny. *Id.* at 46, 340 S.E.2d at 421. *Hamlet*, however, is distinguishable. Unlike in *Hamlet*, here, the State proffered evidence in addition to evidence of defendant's possession of the stolen goods. Detective Humphries testified that at 12:15 p.m. on 8 November 2010, he discovered a shoeprint in some sand outside Breese's house that, in his lay opinion, matched the

soles of the shoes found on Madsen's patio. Accordingly, we examine the sufficiency of the State's shoeprint evidence.

In reviewing the sufficiency of shoeprint evidence, we apply the *Palmer* "triple inference" test:

> [E]vidence of shoeprints has no legitimate or logical tendency to identify an accused as the perpetrator of a crime unless the attendant circumstances support this triple inference: (1) that the shoeprints were found at or near the place of the crime; (2) that the shoeprints were made at the time of the crime; and (3) that the shoeprints correspond to shoes worn by the accused at the time of the crime.

State v. Ledford, 315 N.C. 599, 611, 340 S.E.2d 309, 317 (1986) (quoting *State v. Palmer*, 230 N.C. 205, 213, 52 S.E.2d 908, 913 (1949)). A lay witness may testify as to the identity of a shoeprint and its correspondence with shoes worn by a defendant. *Id.*, 340 S.E.2d at 317. Here, Detective Humphries found the shoeprint in some sand outside of Breese's house, only several hours after the Breese offenses were committed and only several hours after defendant left the corresponding shoes on Madsen's patio a few miles away. Accordingly, we hold that the shoeprint evidence satisfies the *Palmer* "triple inference" test. *See id.*, 340 S.E.2d at 317; *Palmer*, 230 N.C. at 213, 52 S.E.2d at 913. We thus hold that the State's shoeprint evidence, coupled with the evidence of defendant's possession of Breese's stolen goods, is

sufficient to support defendant's convictions for the Breese offenses.

V. Motion to Sever

A. Standard of Review

We review a trial court's denial of a motion to sever for an abuse of discretion. *State v. McDonald*, 163 N.C. App. 458, 463, 593 S.E.2d 793, 796, *disc. rev. denied*, 358 N.C. 548, 599 S.E.2d 910 (2004). But, if the joined charges possess no transactional connection, then the trial court's decision to join is improper as a matter of law. *State v. Owens*, 135 N.C. App. 456, 458, 520 S.E.2d 590, 592 (1999). A defendant waives his right to sever if he fails to renew his pretrial motion to sever "before or at the close of all the evidence." N.C. Gen. Stat. § 15A-927(a)(2) (2013); *see also State v. Agubata*, 92 N.C. App. 651, 661, 375 S.E.2d 702, 708 (1989) (holding that defendant who moved to sever at the first day of trial but failed to renew his motion at the close of all the evidence waived his right to sever). If a defendant waives his right to sever, our review is limited to reviewing whether the trial court abused its discretion at the time of its decision to join. *McDonald*, 163 N.C. App. at 463-64, 593 S.E.2d at 796-97; *State v. Silva*, 304 N.C. 122, 127-28, 282 S.E.2d 449, 452-53 (1981).

Here, defendant renewed his pretrial motion to sever during jury selection, and the trial court again denied it. But defendant did not renew his motion at the close of all the evidence. Consequently, defendant waived his right to sever, and our review is limited to reviewing whether the trial court abused its discretion at the time of its decision to join. *See Agubata*, 92 N.C. App. at 661, 375 S.E.2d at 708; *McDonald*, 163 N.C. App. at 463-64, 593 S.E.2d at 796-97; *Silva*, 304 N.C. at 127-28, 282 S.E.2d at 452-53.

B. Analysis

Defendant challenges the trial court's denial of his motion to sever. "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) (2013). Under this rule, we determine (1) whether the offenses have a transactional connection; and (2) whether the defendant can receive a fair hearing on more than one charge at the same trial. *State v. Perry*, 142 N.C. App. 177, 180-81, 541 S.E.2d 746, 748 (2001) (citing *State v. Montford*, 137 N.C. App. 495, 498, 529 S.E.2d 247, 250, *cert. denied*, 353 N.C. 275, 546 S.E.2d 386 (2000)).

In determining whether offenses have a transactional connection, we consider (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. *State v. Peterson*, 205 N.C. App. 668, 672, 695 S.E.2d 835, 839 (2010); *Perry*, 142 N.C. App. at 181, 541 S.E.2d at 749. Two factors frequently examined are a common *modus operandi* and the time lapse between offenses. *State v. Williams*, 355 N.C. 501, 530-31, 565 S.E.2d 609, 627 (2002), *cert. denied*, 537 U.S. 1125, 154 L.Ed. 2d 808 (2003). If joinder hinders or deprives the defendant of his ability to present his defenses, the trial court should not join the charges. *Williams*, 355 N.C. at 529, 565 S.E.2d at 626; *Silva*, 304 N.C. at 126, 282 S.E.2d at 452. "[T]he test on review is are the offenses so separate in time and place and so distinct in circumstances as to render consolidation unjust and prejudicial to the defendant." *Peterson*, 205 N.C. App. at 672, 695 S.E.2d at 839.

Defendant was charged with breaking into three personal beachfront residences to commit a larceny therein within 2.5 miles of each other and within a three-day span. The offenses thus have a transactional connection. *See Perry*, 142 N.C. App.

at 181, 541 S.E.2d at 749; *Williams*, 355 N.C. at 530-31, 565 S.E.2d at 627.

Defendant contends that the joinder of the cases prejudiced him and mentions that, during jury selection, two venirepersons indicated that it would be difficult for them to be fair and impartial given the number of charges. But defendant did not include a transcript of the jury selection in our record and did not assert that these venirepersons actually served on the jury. Because defendant does not challenge the fairness and impartiality of the jury, we conclude that joinder of the cases did not prevent defendant from receiving a fair trial. Accordingly, we hold that the trial court did not abuse its discretion in denying defendant's motion to sever. *See Perry*, 142 N.C. App. at 180-81, 541 S.E.2d at 748.

VI. Conclusion

For the foregoing reasons, we hold that the trial court committed no error.

NO ERROR.

Chief Judge MCGEE and Judge BRYANT concur.