

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 16-1089

Filed: 3 October 2017

Pitt County, Nos. 05 CRS 57020, 06 CRS 54112

STATE OF NORTH CAROLINA

v.

MACEO LAMONT GARDNER, Defendant.

Appeal by Defendant from order entered 28 September 2015 by Judge Marvin K. Blount, III, in Pitt County Superior Court. Heard in the Court of Appeals 5 April 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Robert T. Broughton, for the State.

North Carolina Prisoner Legal Services, Inc., by Reid Cater, for Defendant-Appellant.

INMAN, Judge.

Maceo Lamont Gardner (“Defendant”) appeals from the denial of a Motion for Appropriate Relief (“MAR”) in which Defendant sought to vacate two convictions for possession of burglary tools. Defendant argues that the charging documents failed to allege an essential element of the crime and were therefore facially invalid to confer

subject matter jurisdiction on the trial court. Defendant further contends that the trial court erred in relying on evidence outside the charging documents in its order denying his MAR. After careful review, we affirm.

FACTS AND PROCEDURAL HISTORY

Defendant was charged with two counts of felony possession of burglary tools in 2005 and 2006. The first count, per the indictment, alleged Defendant “unlawfully, willfully and feloniously did without lawful excuse have in his possession implements of housebreaking, gloves and a flashlight.” The second count, alleged by a bill of information signed by Defendant (together with the indictment as the “Charging Documents”), charged that Defendant “unlawfully, willfully and feloniously did without lawful excuse have in the defendant’s possession an implement of housebreaking, a pair of socks used for attempt [sic] break [sic] and entering.”

Defendant pleaded guilty to both counts in November 2006. Per a plea agreement, the State: (1) dismissed additional pending charges for attempted second-degree burglary, attempted first-degree burglary, possession of cocaine, possession of drug paraphernalia, and carrying a concealed weapon; and (2) consolidated Defendant’s charges for possession of burglary tools with another pending charge for assault on a government official into a single class I felony judgment. The trial court sentenced defendant to eight to ten months’ imprisonment on 16 November 2007.

Eight years later, on 22 December 2014, Defendant filed an MAR seeking to vacate his conviction on the grounds that gloves, a flashlight, and socks are not housebreaking tools, and, as a result, the Charging Documents failed to allege the possession of implements of housebreaking. Because the indictments failed to allege a necessary element of the crime, Defendant argued, the trial court never obtained subject matter jurisdiction necessary to convict him.

The trial court entered its order denying Defendant’s MAR on 28 September 2015. Following a detailed analysis of the facts and controlling case law, the trial court concluded that “the items enumerated in the indictments were each ‘burglary tools’ within the meaning of [N.C. Gen. Stat. §] 14-55.” The trial court supported its conclusion in part on “the Defendant’s guilty plea—coupled with his own admission and the trial court’s finding of facts sufficient to support the plea” Defendant filed a petition for writ of certiorari appealing the trial court’s order, and we granted Defendant’s petition by order dated 30 December 2015.

ANALYSIS

Defendant renews on appeal his argument below that the Charging Documents were facially invalid and therefore fatally defective to confer subject matter jurisdiction necessary to his conviction. He also asserts a new argument—that the trial court erred by relying on evidence outside the Charging Documents to resolve the facial validity challenge to his conviction. We disagree.

STATE V. GARDNER

Opinion of the Court

In reviewing a denial of an MAR on appeal, the trial court's findings are "binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court's conclusions of law are fully reviewable on appeal." *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (citation and internal quotation marks omitted). The facial validity of an indictment and the related issue of subject matter jurisdiction are reviewed *de novo*. *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009).

Charging instruments " 'must allege lucidly and accurately all the essential elements of the offense endeavored to be charged.' " *State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600 (2003) (quoting *State v. Greer*, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953)). This requirement is derived from the language of Article I, Section 22 of the North Carolina Constitution, *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996), as well as N.C. Gen. Stat. § 15A-924(a)(5) (2015) of the Criminal Procedure Act, *State v. Spivey*, 368 N.C. 739, 742, 782 S.E.2d 872, 874 (2016). Failure to comport with these constitutional and statutory mandates "deprives the trial court of jurisdiction to enter judgment in a criminal case." *State v. Haddock*, 191 N.C. App. 474, 476, 664 S.E.2d 339, 342 (2008).

Given that a material defect in an indictment is fatal to a prosecution, "the 'true and safe rule' for prosecutors in drawing indictments is to follow strictly the precise wording of the statute because a departure therefrom unnecessarily raises

doubt as to the sufficiency of the allegations to vest the trial court with jurisdiction to try the offense.” *State v. Sturdivant*, 304 N.C. 293, 310-11, 283 S.E.2d 719, 731 (1981). Doing so satisfies the State’s burden of “identify[ing] clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and . . . protect[s] the accused from being jeopardized by the State more than once for the same crime.” *Id.* at 311, 283 S.E.2d at 731.

N.C. Gen. Stat. § 14-55 (2005) makes it a felony for an individual to “hav[e] in his possession, without lawful excuse, any picklock, key, bit, or other implement of housebreaking[.]” Thus, a charging instrument alleging violation of the statute must allege: “(1) That the person charged was found having in his possession an implement or implements of housebreaking enumerated in, or which come within the meaning of the statute, and (2) that such possession was without lawful excuse.” *State v. Morgan*, 268 N.C. 214, 220, 150 S.E.2d 377, 382 (1966) (citation omitted).

The Charging Documents in the instant case complied with the “true and safe rule” noted in *Sturdivant*, 304 N.C. at 310-11, 283 S.E.2d at 731, by following the plain language of the statute setting forth the offense alleged. Both Charging Documents began with substantially identical allegations that Defendant “unlawfully, willfully and feloniously did without lawful excuse have in his possession implements of housebreaking” and then listed the specific items alleged to fall within

the statute. We hold this language is sufficient to confer subject matter jurisdiction on the trial court.¹

Defendant argues that gloves, socks, and a flashlight are outside the scope of N.C. Gen. Stat. § 14-55 *per se* and cannot be considered “implements of housebreaking” as a matter of law. In support of his argument, Defendant points to the decision in *State v. Morgan*, 268 N.C. 214, 150 S.E.2d 377 (1966), wherein the North Carolina Supreme Court held that “two small screwdrivers, [a] tire tool, . . . flashlights, and . . . socks . . . [are] not implements of housebreaking within the intent and meaning of [N.C. Gen. Stat. §] 14-55.” 268 N.C. at 221, 150 S.E.2d at 382. A thorough review of *Morgan*, its predecessors, its progeny, and the related cases interpreting N.C. Gen. Stat. § 14-55 does not support such a bright line interpretation of *Morgan* or N.C. Gen. Stat. § 14-55 in this case.

In *Morgan*, our Supreme Court cited *State v. Boyd*, 233 N.C. 79, 25 S.E.2d 456 (1943), for “a most interesting account of the historical background leading up to the enactment by the General Assembly of the statute now codified as [N.C. Gen. Stat. §] 14-55.” *Morgan*, 268 N.C. at 220, 150 S.E.2d at 381.² The indictments in *Boyd* listed

¹ The parties offer differing positions on whether the State was required to explicitly set forth the “implements of housebreaking” in the Charging Documents in order to constitute facially valid instruments capable of conferring subject matter jurisdiction. We need not decide the question, however, because the State expressly identified the implements relevant to the charges in question in the Charging Documents.

² The predecessor statute analyzed in *Boyd* is almost identical to N.C. Gen. Stat. § 14-55 and criminalized the “possession, without lawful excuse, any pick-lock, key, bit or other implement of

numerous “implements of burglary[.]” including, *inter alia*, pistols, ammunition, bolt cutters, pliers, nippers, gloves, flashlights, screwdrivers, and a blackjack. 223 N.C. at 79-80, 25 S.E.2d at 456. Following its historical analysis of N.C. Gen. Stat. § 14-55’s predecessor statute, the Supreme Court observed that “[i]n the light of the foregoing it is clear that in this State, under the statute, the gravamen of the offense is the possession of burglar’s tools without lawful excuse[.]” *Boyd* at 84, 25 S.E.2d at 459. The *Boyd* court then held that an implement falls within the ambit of the statute if it “is made and designed for the express purpose of housebreaking” or if it “is such temporarily and for a particular purpose[.]” *Id.* at 84, 25 S.E.2d at 459 (citation and internal quotation marks omitted). As to this second category, a court is to look at “two considerations: First, is [the implement] one that is reasonably adapted for use in housebreaking; and, second, was it at the time intended or actually used for that purpose?” *Id.* at 84, 25 S.E.2d 459 (citation and internal quotation marks omitted). Because all of the items in the indictments in *Boyd*—with the exception of a bit and the pistols—were not designed expressly for or had lawful uses outside of housebreaking, the Supreme Court applied the latter analysis and asked whether “any of the implements were reasonably adapted for use in housebreaking, or [if] they were the kind of implements used by burglars[.]” and whether “defendants possessed

housebreaking[.]” *Boyd*, 223 N.C. at 83, 25 S.E.2d at 458 (internal quotation marks and citation omitted), ; *compare with* N.C. Gen. Stat. § 14-55 (making unlawful the “possession, without lawful excuse, any picklock, key, bit, or other implement of housebreaking”).

the implements, singly or in combination, as burglar's tools or for the purpose of housebreaking.” *Id.* at 85, 25 S.E.2d at 459. The Court, after considering the record evidence, resolved these questions in the negative and reversed the convictions. *Id.* at 85, 25 S.E.2d at 459-60.

Two decades after *Boyd*, *Morgan* sought to resolve whether “one crowbar, three screwdrivers, one tire tool, gloves, flashlights, and socks” fell within the meaning of “other implement[s] of housebreaking” in N.C. Gen. Stat. § 14-55. *Morgan*, 268 N.C. at 219, 150 S.E.2d at 381. In discussing the latter three items, the *Morgan* Court acknowledged that they “are not breaking tools[,]” but noted, “[b]urglars may commonly carry them on their burglarious expeditions to furnish light and to avoid leaving fingerprints while they are breaking into buildings, but they do not use them for breaking.” *Id.* at 220, 25 S.E.2d at 381.³ The Court went on to examine additional evidence, and likewise concluded that two smaller screwdrivers and a tire iron were not utilized in the crime in question, had lawful uses, and were therefore outside the reach of N.C. Gen. Stat. § 14-55. *Id.* at 220-21, 150 S.E.2d at 381-82.

Our more recent decisions, recognizing the qualitative, evidence-focused heuristic analysis employed in both *Boyd* and *Morgan*, have declined to determine

³ We decline to read *Morgan* as a *per se* declaration that these implements could never constitute “other implement[s] of housebreaking” within the scope of N.C. Gen. Stat. § 14-55; for example, a flashlight of significant size, weight, and durability could be used to break a window just as easily as other items found to fall within the statute’s catch-all provision. *See, e.g., State v. Bagley*, 43 N.C. App. 171, 258 S.E.2d 427 (1979), *aff’d*, 300 N.C. 736, 268 S.E.2d 77 (1980) (holding that a tire iron can constitute an implement of housebreaking under the law).

per se whether a particular item with an entirely lawful use constitutes an “other implement of housebreaking[.]” *See, e.g., Bagley*, 43 N.C. App. at 174-77, 258 S.E.2d at 430-31 (refusing to follow a *per se* approach and adopting the analysis employed in *Boyd, Morgan*, and other decisions, as “[i]t enables the trial court to view the total circumstances surrounding the possession and use of an object to make a determination about it. It also avoids having to engage in counting exercises to see if legitimate uses for a tool outnumber potentially criminal uses. By considering the manner in which an object [c]an be used in conjunction with considering how that same object actually [w]as used . . . , a greater uniformity of decisions may be reached than is possible under any [a]d hoc approach. The sureness of the equal application of the law is enhanced, and all persons who might be affected by the application or administration of this statute can receive meaningful notice of what constitutes an offense under its provisions.”). In short, “the gist of the offense is [the] possession [of an article] for the unlawful purpose of breaking into a building[.]” and an item falls within the statute where “the defendant possessed the article in question with a general intent to use it at some time for the purpose of facilitating a breaking.” *Bagley*, 300 N.C. 736, 740-41, 268 S.E.2d 77, 79-80 (citation omitted).⁴ This analysis “t[ies] the application of [N.C. Gen. Stat. §] 14-55’s prohibition to both the use to

⁴ The North Carolina Pattern Jury Instructions also recognize this qualitative test, and allows for a jury to find that an item is an “implement of housebreaking” if “it is made and designed for the purpose of housebreaking, or is commonly carried and used by housebreakers, or is reasonably adapted for such use.” N.C.P.I. Crim. 214.35 (2002).

which a particular instrument may be put and the circumstances under which it is found to be in defendant's possession," and its resolution "will of necessity depend upon the strength of the circumstantial evidence." *Id.* at 740-41, 268 S.E.2d at 79-80.

Bagley demonstrates the difficulties of applying a *per se* test to the statute in question, as that decision held that a tire iron could be an "other implement of housebreaking" contrary to the result reached by the North Carolina Supreme Court in *State v. Garrett*, 263 N.C. 773, 140 S.E.2d 315 (1965), and the *ejusdem generis* doctrine itself does not support a *per se* test. If the common element among "picklock[s], key[s], [and] bit[s]" in N.C. Gen. Stat. § 14-55 is their use to forcibly open or access a building so that the doctrine would apply the statute only to items that could be so used, that use is necessarily dependent on the factual nature of: (1) the implement; and (2) the susceptibility of the building in question to entry by the use of such an implement. Thus, whether an implement shares with a "picklock, key, [or] bit" the capacity for use to gain entry into a building by force depends on the facts as shown by the evidence. Indeed, in affirming this Court's decision in *Bagley*, the Supreme Court wrote that the use of the *ejusdem generis* doctrine "in *Garrett* [to hold that a tire iron was not within the meaning of the statute] was not intended to mean that a tire tool or other like instrument may never, under any circumstances, be considered an implement of housebreaking. Narrowed to its essence, the holding in

Garrett was simply that the [S]tate had failed to produce evidence sufficient to show that defendant's possession of the tire tool was 'without lawful excuse' as required by the statute." 300 N.C. at 739, 268 S.E.2d at 79 (emphasis added).

This Court addressed this qualitative analysis and its interplay with the facial validity of charging instruments in *State v. Cadora*, 13 N.C. App. 176, 185 S.E.2d 297 (1971). There, a defendant was indicted under N.C. Gen. Stat. § 14-55 with the possession of a chisel, a screwdriver, a walkie-talkie, gloves, and phone listening devices. *Id.* at 177, 185 S.E.2d at 298. The defendant pleaded guilty but later challenged the facial validity of the indictment on the grounds that the items listed were not implements of housebreaking covered by the statute. *Id.* at 178, 185 S.E.2d at 298. On appeal to this Court, we recognized the qualitative evidentiary analysis employed in *Morgan* to determine whether the otherwise mundane items constituted "other implements of housebreaking" and held that the defendant's "contention [to the contrary] comes too late." *Id.* at 179, 185 S.E.2d at 299. Although the defendant in *Cadora* may very well have been correct that the items listed in the indictment were not actually burglar's tools upon a qualitative evidentiary analysis:

by stating under oath to the judge that he was guilty, he admitted that they were implements of housebreaking. The guilty plea thus eliminated the burden on the State to prove that the defendant had in his possession . . . implements of housebreaking enumerated in, or which come within, the provisions of [N.C. Gen. Stat. §] 14-55, and that such possession was without lawful excuse. Under the factual circumstances of this case . . . [t]his

defendant cannot now successfully urge that the combination of instruments as set out in the indictment did not fit the description of other implements of housebreaking and that he had a lawful excuse to have them in his possession.

Id. at 179-80, 185 S.E.2d at 299 (internal citation and quotation marks omitted).

Cadora is directly on point here. The Charging Documents identified the items in Defendant's possession that the State contends violated N.C. Gen. Stat. § 14-55, closely following the statute's language. This was sufficient to confer subject matter jurisdiction on the trial court. *Sturdivant*, 304 N.C. at 310-11, 283 S.E.2d at 731. Whether the items listed in the Charging Documents are actually "other implements of housebreaking," however, is a qualitative question resolved by an examination of the evidence. *Boyd*, 223 N.C. at 85, 25 S.E.2d at 459-60; *Morgan*, 268 N.C. at 220-21, 150 S.E.2d at 381-82; *Bagley*, 300 N.C. at 740-41, 268 S.E.2d at 79-80; *Cadora*, 13 N.C. App. at 179, 185 S.E.2d at 299. Defendant, having received notice of the items alleged as "implements of housebreaking," could have raised the precise defense at trial that he now raises on appeal: that the specified items in the charging documents failed to satisfy the elements of the crime. Instead, he pleaded guilty. Defendant's "guilty plea . . . eliminated the burden on the State to prove that the defendant had in his possession . . . implements of housebreaking . . . which come within . . . the provisions of [N.C. Gen. Stat. §] 14-55," and he therefore may not contest whether

the items alleged in the Charging Documents satisfy a necessary element of the crime charged. *Cadora* at 179, 185 S.E.2d at 299.

Defendant advances a second argument that the trial court erred in denying his MAR because its reference to and reliance on the Defendant's guilty plea extends beyond the scope of a facial analysis. However, the trial court did not need to rely on Defendant's guilty plea to resolve the subject matter jurisdiction question. Though the trial court may have put the cart before the horse in tying the qualitative evidentiary analysis to a resolution of the facial validity of the Charging Documents and the issue of subject matter jurisdiction, the fact that it did so does not alter the outcome of this appeal.

CONCLUSION

The trial court properly denied Defendant's MAR. The State's Charging Documents closely followed the language of the statute outlawing the conduct alleged and specifically identified the items the State contended Defendant unlawfully possessed. The language in the Charging Documents was sufficient to confer subject matter jurisdiction on the trial court, given that the items identified were not *per se* beyond the scope of N.C. Gen. Stat. § 14-55 but were instead subject to a qualitative evidentiary analysis to determine whether their possession was unlawful and within the activity prohibited by the law.

AFFIRMED

STATE V. GARDNER

Opinion of the Court

Judges ELMORE and BERGER concur.

Report per Rule 30(e).