NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
DOUGLAS BROWN	:	
Appellant	:	No. 938 WDA 2021

Appeal from the Judgment of Sentence Entered June 21, 2021
In the Court of Common Pleas of Beaver County Criminal Division at
No(s): CP-04-CR-0000382-2020

BEFORE: BENDER, P.J.E., LAZARUS, J., and McCAFFERY, J.

MEMORANDUM BY BENDER, P.J.E.: **FILED: APRIL 19, 2022**

Appellant, Douglas Brown, appeals from the judgment of sentence of an aggregate term of 72 to 240 years' incarceration, imposed after a jury convicted him of burglary of an overnight accommodation (no person present), 18 Pa.C.S. § 3502(a)(2), criminal trespass, 18 Pa.C.S. § 3503(a)(1)(i), receiving stolen property, 18 Pa.C.S. § 3925, and two counts of criminal conspiracy, 18 Pa.C.S. § 903(a)(1). On appeal, Appellant challenges the sufficiency of the evidence to sustain his burglary conviction, and he also argues that the court erred by admitting certain evidence. After careful review, we affirm.

The trial court summarized the evidence presented at Appellant's jury trial, as follows:

> The Commonwealth presented evidence that [Appellant] participated with three other individuals in a burglary at Walter Lapic's property on January 17, 2020, with [Appellant] serving as

the "getaway driver" who sped away after the others removed items from the property. [Appellant] presented evidence that he did not participate in removing items, that the individuals believed they had permission to remove items from the property, and that the house in question was not adapted for overnight accommodation.

Joshua Lapic

Joshua Lapic testified that, on the morning of January 17, 202[0], he was driving past the property of his second cousin[,] Walter Lapic, located at 690 Route 68 in Daugherty Township, when he saw an unfamiliar vehicle parked in the driveway. [N.T.] Trial … Vol[.] I[, 5/10/21,] at 25-27. He turned around and drove past the property two more times, the third time noticing two men standing near the unfamiliar vehicle, one of whom he identified as [Appellant]. ***Id.*** at 28. He called Walt[er]'s brother[,] James Lapic[,] and asked him if anyone was supposed to be at Walt[er]'s property[.] … James said no. ***Id.*** at 29. Joshua identified photographs taken at Walt[er]'s property on the morning of the burglary, including photographs of fresh footprints he found in the snow. ***Id.*** at 30-36. He agreed that the photographs depicted many items stored outside Walt[er]'s property, including car parts, scrap, buckets, and wood. ***Id.*** at 47-55. He denied that the property looks abandoned, but agreed that it looks like it needs significant repairs and that it was fair to say Walt[er] is a hoarder. ***Id.*** at 44, 59.

James Lapic

James Lapic testified that, on January 16, 2020, his brother[,] Walt[er,] called and asked him to check on his property because he had received electric or gas bills that were unusually high. ***Id.*** at 64. James and Joshua Lapic visited the property and found doors and windows open. ***Id.*** James closed the doors and put locks on and screwed the windows shut. ***Id.*** at 64-65.

On January 17, 2020, James received a call from Joshua indicating that a car was parked in Walt[er]'s driveway. ***Id.*** at 65. James, who lived five minutes away, went to the property and at first found no car there. He walked around the house and saw a female on the property. ***Id.*** at 66-68.

He asked her what she was doing there and she said she was looking for her lost cat. ***Id.*** at 68. James continued to walk around the house when he saw a high-school-age boy on the

property. ***Id.*** at 68-69. He noticed the female and boy each had a pile of stuff beside them and he said[,] "I'm going to call the police." ***Id.*** at 69. The boy began yelling for his mother, saying[,] "You gotta get out of here. We gotta go." ***Id.*** at 70-71. James then saw a woman come out of the house by crawling through a broken piece of plywood on a screen door that James had put a lock on the previous day. ***Id.*** at 72-73. The woman had stuff in her hands that she had brought out of the house. ***Id.*** at 74. The three people ran towards the road and up to the top of the hill where a car was waiting for them. ***Id.*** at 74-75, 83. They got in the car and sped away. ***Id.*** at 74-75. James ran after them and got the license plate number of the car. ***Id.*** He also saw the driver's face in the sideview mirror and identified the driver as [Appellant]. ***Id.*** at 75-76. He admitted that he never saw [Appellant] on the property, breaking into anything, or removing items from the property. ***Id.*** at 81-83. The items that James saw in the hands or around the feet of the individuals on the property included cameras, knickknacks, a wine jug, braided belts, and a carburetor. ***Id.*** at 77-78. James testified that they had a pile of stuff that they looked like they were leaving with, but they didn't take all of it. ***Id.*** at 78.

James testified that Walt[er] was living at the house, though at the time of the break-in[,] he had been staying at another brother's place for a week or so because he had a bad hip and couldn't move around on this own. ***Id.*** at 86, 88. James acknowledged that the property had garbage and vehicles throughout the yard and the brush was overgrown. ***Id.*** at 87-88. He agreed that the house was in rough shape[,] but said that Walt[er] was nevertheless living in it and intended to go back as soon as he felt better. ***Id.*** at 87-88. James testified that the doors and windows had all been operable but, as a result of the doors and windows he found left open on January 16, 2020[,] by "who[m]ever got into" the house, the plumbing froze and the pipes burst, and Walt[er] could not return to live there. ***Id.*** at 87-90.

Walter Lapic

Walter Lapic testified that he left his house to stay with his brother[,] Ronald Lapic[,] just before Christmas 2019 because he was sick with a heavy chest cold and couldn't get around by himself, but he had planned to return to the house as soon as he got better. ***Id.*** at 92-93, 111. He said the house had running water while he was there, but after James checked on the property

on January 16, 2020[,] to investigate an unusually high heating bill, James told him the pipes had frozen. ***Id.*** at 94-95. Walt[er] stated that, at the time of trial, he continued to receive utility bills for the property and still maintained gas service there. ***Id.*** at 93.

Walt[er] testified that no one had permission to be at his house on January 17, 2020[,] and that he called the police when James told him people were there. ***Id.*** at 101. He later identified some items recovered by police as being his property, including some car grilles and a musket made into a lamp. ***Id.*** at 102-10.

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Officer Keith Smith

Officer Keith Smith of the New Brighton Area Police Department testified that he was dispatched to Walter Lapic's property on January 17, 2020[,] for a report of a burglary in progress. ***Id.*** at 122. Officer Smith ran the license plate number provided by James Lapic and determined that the vehicle was registered to Lauren Leone at a Beaver address. ***Id.*** at [124]-25. Police soon located the vehicle parked outside a residence located at 508 Route 68, about a mile or two from the Lapic property. ***Id.*** at 125. The four individuals described by James Lapic, including [Appellant], were found at that residence. ***Id.*** at 126. A box just inside the … doorway [of the residence] contained items including a camera, wine jug, car parts, knickknacks, and collectibles. ***Id.*** at 130.

Officer Smith questioned some of the apprehended individuals and his investigation indicated that a residence located at 212 Mercer Avenue in New Brighton was being used as a storage facility for stolen items. ***Id.*** at 135. A search warrant was executed on that address and items were seized, including musical instruments, amplifiers, car grilles, and a musket made into a lamp. ***Id.*** at 137-38. Those items had been identified on a list Walter Lapic had made at Officer Smith's direction. ***Id.*** at 134, 138-39. Officer Smith agreed that [Appellant] had not been seen at 212 Mercer Avenue and had not been specifically named as being responsible for taking items there. ***Id.*** at 155-57. He agreed that all of the items found at 212 Mercer Avenue could not have fit in the vehicle [Appellant] was identified as driving away from the Lapic property. ***Id.*** at 164. He stated that it was possible that all of those items could have been removed from the Lapic property on January 17,

2020, but admitted that he did not know with certainty how long they had been at 212 Mercer Avenue. ***Id.*** []

Officer Smith obtained shoes from each of the four suspects and positively matched them with the shoeprints photographed in the snow at the Lapic property on January 17, 2020. ***Id.*** at 140-47, 170. He photographed [Appellant's] shoes pursuant to a search warrant and identified the same bottom tread pattern in one of the photographed shoeprints. ***Id.*** at 145-47. He agreed that he did not know where on the property [Appellant's] shoeprints had been found. ***Id.*** at 159.

Officer Smith agreed that the Lapic property was kind of like a junkyard, with overgrown brush, falling down structures, and cars all over the place. ***Id.*** at 150. On the day of the alleged burglary, he did not think the inside of the house was safe for him to enter because it was dilapidated and in disrepair. ***Id.*** From what he could see inside, the house looked like something from the show Hoarders. ***Id.*** at 151. Officer Smith also authenticated an incident report written by Officer Matthew Doerschner on August 18, 2019. ***Id.*** at 151-54. Responding to Walter Lapic's complaint that a lock was missing from a rear door at his home, Officer Doerschner recorded that he "attempted to enter this residence, but there was a very small path through 6-foot high piles of [Mr.] Lapic's belongings. From what we could see through the windows and open door, the rest of the house appeared to be the same way. There was no way that we could enter this residence safely." ***Id.*** at 154-55. Walter Lapic was living in the house at the time of the August 18, 2019 report. ***Id.*** at 168-69.

Mandy Kerns

[Appellant's] sister[,] Mandy Kerns[,] testified that, in January 2020, she and [Appellant] traveled from Ohio to Pennsylvania so [Appellant] could pay some money to his girlfriend[,] Lauren Leone's[,] landlord. ***Id.*** at 181-82. Ms. Kerns said that, before she went to the Lapic property, Anthony Besiso had told her it was the property of Darrin Saunders's uncle who had been dead for fourteen years and that Saunders was in charge of getting rid of everything on the property. ***Id.*** at 183. Anthony Besiso resided at 212 Mercer Avenue. ***Id.*** at 183-84.

On January 17, 2020, Ms. Kerns went to the Lapic property with [Appellant], Lauren Leone, and Ms. Kerns's son[,] Michael. ***Id.*** at 184. She denied that they had any agreement about what they were going to do there or that they had an agreement to break in.

> ***Id.*** at 185, 197. Ms. Kerns testified that she understood the items on the property were unwanted trash and she didn't think they were doing anything wrong. ***Id.*** at 185-86. She testified that Lauren Leone said that Darrin Saunders said that they could go and take whatever was there. ***Id.*** at 197. She asserted that she would not have gone to the property had she known it belonged to Walter Lapic. ***Id.*** at 196. She said [Appellant] drove them to the property[] but volunteered to stay by the car with her mentally-ill son while she and Ms. Leone went into the house. ***Id.*** at 189-90. She admitted that she entered the house through a broken back door. ***Id.*** at 201. She heard [Appellant] beep the car horn while she was inside the house and, when she came out, James Lapic was on the property saying he was calling the police. ***Id.*** at 204-[0]5. Ms. Kerns said she ran to the car and left without waiting to talk to the police because she was scared. ***Id.*** at 207. She denied that she was scared because there had been an agreement to burglarize the Lapic property. ***Id.*** at 207-[0]8. She testified that, to her knowledge, [Appellant] never entered the house or removed anything from the property. ***Id.*** at 191.
>
> Ms. Kerns testified that she had been at 212 Mercer Avenue prior to January 17, 2020[,] and [she] saw that Mr. Besiso had items there including guns, guitars, and amplifiers. ***Id.*** at 192-94. She identified guitar cases and amplifiers in photos of items later recovered from 212 Mercer Avenue, indicating that she had seen them there prior to January 17[th]. ***Id.*** at 194. She stated that she had not seen anyone taking any of the items in the photos from the Lapic property or from 508 Route 68 on January 17[th]. ***Id.***

Trial Court Opinion (TCO), 10/8/21, at 1-7.

Based on this evidence, the jury convicted Appellant of the above-stated offenses on May 11, 2021. On June 21, 2021, the court sentenced him to the aggregate term set forth *supra*. Appellant filed a timely, post-sentence motion, which was denied. He then filed a timely notice of appeal, and he also complied with the trial court's order to file a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. The trial court filed its Rule 1925(a) opinion on October 8, 2021.

Herein, Appellant states two issues for our review:

> A. Was [the] evidence insufficient to establish that the structure involved in the underlying burglary was adapted for overnight accommodation?
>
> B. Did the trial court err by allowing evidence that was not relevant, highly prejudicial, and contrary to an agreement, specifically that the introduction of the property owner's previously stolen items and testimony concerning a third property where additional items were recovered?

Appellant's Brief at 6-7.

Our standard of review of Appellant's first issue is as follows:

> In reviewing a sufficiency of the evidence claim, we must determine whether the evidence admitted at trial, as well as all reasonable inferences drawn therefrom, when viewed in the light most favorable to the verdict winner, are sufficient to support all elements of the offense. ***Commonwealth v. Moreno***, 14 A.3d 133 (Pa. Super. 2011). Additionally, we may not reweigh the evidence or substitute our own judgment for that of the fact finder. ***Commonwealth v. Hartzell***, 988 A.2d 141 (Pa. Super. 2009). The evidence may be entirely circumstantial as long as it links the accused to the crime beyond a reasonable doubt. ***Moreno, supra*** at 136.

Commonwealth v. Koch, 39 A.3d 996, 1001 (Pa. Super. 2011).

Instantly, Appellant challenges his conviction of burglary, as defined by the following portion of 18 Pa.C.S. § 3502:

> **(a) Offense defined.--**A person commits the offense of burglary if, with the intent to commit a crime therein, the person:
>
> ***
>
> (2) enters a building or occupied structure, or separately secured or occupied portion thereof that is adapted for overnight accommodations in which at the time of the offense no person is present[.]

18 Pa.C.S. § 3502(a)(2).

Appellant argues that Mr. Lapic's home was not adapted for overnight accommodation at the time of the burglary and, consequently, his conviction for that offense should have been graded as a second-degree felony, rather than a felony of the first degree. ***See*** 18 Pa.C.S. § 3502(c) (stating that all burglary offenses are first-degree felonies, except where the structure burglarized is not adapted for overnight accommodation). To support his position, Appellant focuses on this Court's decision in ***Commonwealth v. Nixon***, 801 A.2d 1241 (Pa. Super. 2002), and our Supreme Court's subsequent opinion in ***Commonwealth v. Graham***, 9 A.3d 196 (Pa. 2010).

In ***Nixon***, the appellant presented the identical claim that Appellant raises herein, arguing that his conviction for burglary should have been graded as a second-degree felony, rather than a first-degree felony, because the rental home he had burglarized was not adapted for overnight accommodation. Nixon stressed that no one had lived in the home for several months, it was being renovated at the time of the burglary, and, although the house was furnished, both the water and electricity had been turned off. ***Nixon***, 801 A.2 at 1244. In rejecting Nixon's argument, we relied on the fact that our Court had previously found that "a finished but uninhabited house trailer is a 'building or occupied structure' within the meaning of [section] 3502 of the Crimes Code….'" ***Id.*** (quoting ***Commonwealth v. Mayer***, 362 A.2d 407, 408 (Pa. Super. 1976)). We also noted that rental properties, like the home burglarized by Nixon, "are often without water service or electricity when rented, but the properties are not condemned. A simple telephone call

to the relevant utility companies remedies the situation." ***Id.*** at 1247. Ultimately, we held that "the focus of the determination of whether a structure is adapted for overnight accommodation should be the nature of the structure itself and its intended use, and not whether the structure is in fact inhabited." ***Id.*** Because the rental house that Nixon burglarized "was intended to be used as a residential property[,]" we concluded that it "was adapted for overnight accommodation…." ***Id.*** at 1248.

Contrasting ***Nixon*** with the present case, Appellant stresses that the turned-off utilities in ***Nixon*** were not damaged, and that a telephone call to the utility company could have turned them back on. Here, on the other hand, Mr. Lapic's pipes were damaged so that water service to the home could not be quickly or easily resumed. Appellant also stresses that there was "no evidence in ***Nixon*** that suggest[ed] the house was wholly dilapidated or uninhabitable, just that the house was not inhabited at the relevant time." Appellant's Brief at 21-22. Mr. Lapic's property, however, was essentially a "junkyard" that was "dilapidated" and "definitely in disrepair." ***Id.*** at 25.

Given these facts, Appellant contends that his case is distinguishable from ***Nixon*** and more in line with our Supreme Court's subsequent holding in ***Graham***. There, Graham challenged his conviction for burglarizing a newly-constructed house that had the following characteristics at the time of the burglary:

> [T]he exterior work on the building was complete; windows and doors were installed, albeit lacking trim; concrete was poured; electrical and plumbing rough-in work had been accomplished;

> temporary heat was available for construction purposes; and running water was available via two spigots, one located on the building's exterior and the other in the garage. On the other hand, the owner stated that: only two electrical circuits were active for construction purposes; plumbing was stub, with no fixtures in place and only an unattached pedestal sink on premises; walls were framed, but the framing remained open and uncovered; drywall was on premises but uninstalled; lighting was limited to construction and security purposes; the permanent furnace was in place but not operational; kitchen appliances and cabinets remained packed and stored in the basement; and there was no running water in the planned living space.

Graham, 9 A.3d at 197.

Our Supreme Court determined that the evidence presented in ***Graham*** was "insufficient to support a finding that the subject structure was adapted for overnight accommodation at the time of [Graham's] illegal entry." ***Id.*** at 204. The Court reasoned:

> [R]unning water was available in the planned living space solely via attachment of a garden hose to spigots in the garage or on the exterior; no toilet facilities were present; and there were no furnishings available for sleeping. According to the owner-victim's uncontradicted testimony, all working utility services were configured for construction purposes only.

Id. at 203. The Court emphasized the difference between a structure already adapted for overnight accommodation and those that are in the process of being so adapted, explaining:

> As other courts have recognized, the adaptation inquiry is fact intensive, and material differences will arise depending on the form and degree of adaptation intended and accomplished. In particular, there are pertinent differences between structures which have been fully adapted for overnight accommodation, but which temporarily lack services or other features of full adaptation, and those which have never been so adapted, albeit work may be underway in furtherance of such objective.

Id. at 204.

Notably, the ***Graham*** Court discussed our Court's holding in ***Nixon***, stating*:*

> We have no difficulty with the ***Nixon*** [C]ourt's explanation that the primary focus, in assessing adaptation, should be the nature of the structure and its intended use, as distinguished from present use for inhabitation. ***See Nixon***, 801 A.2d at 1247. We believe, however, that the "nature" criterion is broad enough to subsume consideration of the progress of a planned adaptation in construction scenarios. Indeed, as recognized by the Texas court in [***Blankenship v. State****,* 780 S.W.2d 198 (Tex. Crim. App. 1989) (*en banc*)], there are a multitude of sub-factors which may be considered.[1] ***See*** [***id.***] at 209.
>
> Finally, the ***Nixon*** holding—that a previously completed row house under renovation, with electric and water services suspended, was adapted for overnight accommodation—is not before us presently. We merely reiterate that a finding of adaptation is substantially more reasonable in circumstances in which an already adapted structure lacks features supporting continuous overnight accommodation for some temporary period, than in a situation in which the structure has not yet been adapted

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[1] The ***Blankenship*** Court explained those factors as follows:

> What makes a structure "suitable" or "not suitable" for overnight accommodation is a complex, subjective factual question fit for a jury's determination. Their inquiry could be guided by reference to whether someone was using the structure or vehicle as a residence at the time of the offense; whether the structure or vehicle contained bedding, furniture, utilities, or other belongings common to a residential structure; and whether the structure is of such a character that it was probably intended to accommodate persons overnight (*e.g.* house, apartment, condominium, sleeping car, mobile home, house trailer). All of these factors are relevant; none are essential or necessarily dispositive.

Graham*,* 9 A.3d at 200–01 (quoting ***Blankenship****,* 780 S.W.2d at 209).

> for overnight accommodation, albeit the adaptation may be planned and underway.

Graham, 9 A.3d at 204.

Instantly, Appellant claims that "[t]his case is more analogous to ***Graham***, as although [Mr. Lapic's] ultimate intent may have been to reside in the structure, considerable work would be needed to make it habitable." Appellant's Brief at 24. He further stresses that, "[u]nlike [in] ***Nixon***, no evidence was presented about whether the structure had typical working residential fixtures and was furnished with normal household items such as bedding or furniture. Ample evidence was supplied that the structure was being used as storage." ***Id.*** Appellant also contends that Mr. Lapic — who was labeled a "hoarder" — had allowed the property to fall into such disrepair that officers felt it was unsafe to enter. ***Id.*** According to Appellant, the Lapic property had deteriorated "to the point of inhabitability" and "was more akin to a storage unit." ***Id.*** at 25. He also notes that, although Mr. Lapic "at one point[] was staying on the property, this factor cannot be considered in a vacuum[,]" as "[p]eople sleep under bridges, [but] that does not make a bridge [a place] adapted for overnight accommodation." ***Id.*** For these reasons, Appellant insists that Mr. Lapic's house was more like the property in ***Graham***, rather than the rental home in ***Nixon***.

In rejecting Appellant's sufficiency argument, the trial court aptly explained:

> Viewing the evidence in the light most favorable to the Commonwealth, the [c]ourt finds that a rational jury could have found that [Mr.] Lapic's house was adapted for overnight

accommodation at the time of the burglary. As a house, it was generally of "such a character that it was probably intended to accommodate persons overnight." ***Nixon***[, 801 A.2d] at 1245 (quoting ***Blankenship***[, 780 S.W.2d] at 204). [Mr. Lapic] testified that he had been living there until about a month before the burglary, that he had gone to stay with his brother for health reasons, and that he intended to return and continue living there as soon as his health permitted. The house's intended use was for habitation, even if [Mr. Lapic] was temporarily staying elsewhere at the time of the burglary. He maintained utility services at the property. He learned the day before the burglary that his pipes had frozen, with the evidence suggesting that the frozen pipes were the result of doors and windows being left open by persons not authorized to be on the property. To the extent that they affected the house's habitability, the frozen pipes were, at the time of the burglary, a newly-discovered issue that arose for reasons outside [Mr. Lapic's] control and not as a result of any intention to forsake the property as a residence. Given [Mr. Lapic's] intention to return and live there, the house may be considered "an already adapted structure" that lacked "features supporting continuous overnight accommodation for some temporary period." ***Graham***[, 9 A.3d] at 204. While [Mr. Lapic] was ultimately unable to return to the house because of the damage caused by intruders, his intention at the time of the burglary had been to use the house as a residence.

[Appellant] notes that police had refused to enter the house due to safety concerns[,] and [he] argues that "years of disrepair and neglect" had rendered the house no longer adapted for human habitation. Officer Smith testified that the house looked unsafe to enter shortly after the burglary, but [Appellant also] introduced evidence that Officer Doerschner had believed the house unsafe in August 2019 when [Mr. Lapic] was still living there. Other than the damage caused by intruders, there was no evidence that the property was in a substantially different condition at the time of the burglary than in August 2019 when it was in active use as a residence. It was undisputed that [Mr. Lapic] was a hoarder and maintained his house in a such a condition that an average person may not have been comfortable living there. However, [Mr. Lapic] did in fact live there while it was in that condition and intended to continue living there as soon as his health permitted. Focusing on the nature of the structure and the use intended by its owner, a rational jury could have found that [Mr. Lapic's] house was adapted for overnight accommodation.

TCO at 9-10 (one citation to the record omitted). We agree with the trial court's well-reasoned analysis. Accordingly, Appellant's first issue is meritless.

Appellant next argues that the court erred by admitting evidence regarding items of Mr. Lapic's that were discovered in the home at 212 Mercer Avenue. Initially,

> [t]he standard of review employed when faced with a challenge to the trial court's decision as to whether or not to admit evidence is well settled. Questions concerning the admissibility of evidence lie within the sound discretion of the trial court, and a reviewing court will not reverse the trial court's decision absent a clear abuse of discretion. Abuse of discretion is not merely an error of judgment, but rather where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will.

Commonwealth v. Young, 989 A.2d 920, 924 (Pa. Super. 2010) (citation omitted).

As context for Appellant's claim, we note that, prior to trial, he filed a motion to suppress evidence regarding the "numerous burglaries [of the Lapic property] in the fall of 2019 through January 17, 2020[,]" for which "Darrin Saunders, Jennifer Goldman, and Anthony Besiso were charged…." Appellant's Brief at 14. When those burglaries occurred, Appellant was incarcerated. At a pretrial hearing on Appellant's motion, the Commonwealth consented to excluding evidence concerning those prior thefts. N.T. Hearing, 5/5/21, at 18-19.

At trial, however, the Commonwealth was permitted to elicit testimony from Mr. Lapic that, after the January 17, 2020 burglary, he had prepared an inventory of items missing from his home at the request of the police. ***See*** N.T. Trial Vol. I at 102. The Commonwealth then introduced a photograph of certain items, and Mr. Lapic identified them as belonging to him. ***Id.*** at 105. Defense counsel objected to the admission of the photograph on the basis that it was "[n]ot relevant evidence." ***Id.***

Then, during the direct-examination of Officer Smith, the Commonwealth was permitted to elicit testimony that he had obtained a search warrant for 212 Mercer Avenue, because his investigation of the January 17, 2020 burglary had indicated that items of Mr. Lapic's were being stored at that residence. ***Id.*** at 135. Defense counsel objected to this line of questioning, arguing that the Commonwealth was eliciting "testimony regarding prior thefts at this point." ***Id.*** at 132. The Commonwealth explained, at sidebar, that the officer was told by Mandy Kerns, during his investigation of the January 17, 2020 burglary, that items of Mr. Lapic's were being stored at the 212 Mercer Avenue home. ***Id.*** at 132-33. The court concluded that the Commonwealth had established a sufficient connection between the "investigation that was conducted on the date of this alleged burglary and the search warrant" and, thus, it permitted Officer Smith to testify about items of Mr. Lapic's that were found at 212 Mercer Avenue. ***Id.*** at 133, 135-39.

On cross-examination, Officer Smith admitted that he had no idea how long the items found at 212 Mercer Avenue had been there, and that Appellant had never been "specifically named as being responsible" for taking any items to that residence. ***Id.*** at 157. The officer also conceded that all the items found at 212 Mercer Avenue could not have fit into one car at the same time, but he testified that it was "possible" they could have been moved from Mr. Lapic's property to the 212 Mercer Avenue residence at some point on January 17, 2020. ***Id.*** at 164.

According to Appellant, the admission of this evidence concerning the items recovered from 212 Mercer Avenue impermissibly suggested to the jury that he had been involved in the prior burglaries of Mr. Lapic's residence. He insists that such evidence of prior criminal conduct is precluded under Pennsylvania Rule of Evidence 404(b), which states that "[e]vidence of a crime, wrong, other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character[,]" unless the evidence is admitted "for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. In a criminal case this evidence is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice." Pa.R.E. 404(b). Appellant contends that there was no proper purpose for admitting the evidence about the items recovered from 212 Mercer Avenue, and that the prejudice he suffered from the admission of that evidence far outweighed its probative value.

In support of his position, Appellant avers that his case is analogous to ***Commonwealth v. Nichols***, 400 A.2d 1281 (Pa. 1979). There, the Commonwealth introduced evidence that Nichols had participated in a lineup "with other inmates" in "connection with a totally unrelated crime…." ***Id.*** at 1283. While the Commonwealth argued that the evidence did not prejudice Nichols because the jury would reasonably infer the lineup "was related to the crimes charged at trial[,]"our Supreme Court disagreed. ***Id.*** The Court stressed that other evidence indicated Nichols was the "prime suspect in the lineup and that it was viewed by only one witness, a female, to see if she could identify Nichols." ***Id.*** However, none of the Commonwealth's witnesses in the case for which Nichols was on trial was a female and, thus, the jury "could, under the circumstances, reasonably infer prior unrelated criminal activity by Nichols." ***Id.*** Therefore, the ***Nichols*** Court concluded that "prejudice resulted, and a new trial must be granted." ***Id.***

Here, Appellant claims that his "case is analogous to ***Nichols***[,] as a jury could easily infer prior criminal offenses based off the Commonwealth's evidence." Appellant's Brief at 30. He claims that "the sheer amount of items" found at the 212 Mercer Avenue house would have demonstrated to the jury that they could not have all been taken from Mr. Lapic's property on the same day that Appellant burglarized it, thereby implying that Appellant was involved in previous burglaries.

In concluding that Appellant's issue does not warrant relief, we again rely on the well-reasoned analysis by the trial court:

> [Appellant] argues that the admission of [Mr. Lapic's] list of items he believed were stolen from his house and the evidence of items seized from 212 Mercer Avenue constituted evidence of thefts prior to the January 17, 2020 incident charged against [Appellant] and were, therefore, irrelevant and prejudicial. [Appellant] also notes that the Commonwealth had consented to his motion *in limine* barring it from introducing evidence of prior thefts. However, the Commonwealth presented evidence and argument that the items on [Mr. Lapic's] list[,] and those seized from 212 Mercer Avenue[,] were in fact stolen during the January 17[th] incident charged against [Appellant]. Officer Smith testified that it was possible that all of those items had been removed from the Lapic property on January 17[th]. [***See*** N.T.] Trial … Vol. I at 164. While those items were not among those [that] James Lapic actually witnessed [Appellant's] co-conspirators carrying off [Mr. Lapic's] property, the Commonwealth argued that they could have been put in the trunk of the car [Appellant] was driving before James got there. [***See*** N.T.] Trial … Vol. II[, 5/11/21,] at 31. While those items were not among those recovered from the 508 Route 68 residence where the conspirators were arrested, the Commonwealth argued that they could have been moved to 212 Mercer Avenue in the hours between the burglary and the arrests. ***Id.*** [Appellant] was free to rebut these theories[,] and in part did so, particularly when Mandy Kerns testified that she saw some of the items at 212 Mercer Avenue prior to January 17[, 2020].
>
> Walter Lapic may have reported earlier thefts or break-ins in the months prior to January 17, 2020, but the Commonwealth never introduced evidence of those reports. Only [Appellant] himself, in introducing Officer Doerschner's August 2019 report on [Mr. Lapic's] complaint of a lock missing from a rear door, [admitted] evidence alluding to prior thefts. If the jury had any impression that prior thefts had occurred, [Appellant's] own evidence would have been most responsible for creating that impression.
>
> Moreover, evidence suggesting the possible occurrence of prior thefts would not necessarily prejudice [Appellant]. Given the charge of conspiracy, the jury was well-aware that [Appellant] was not the only person alleged to have stolen from the Lapic property, and neither the Commonwealth nor [Appellant] ever suggested [Appellant's] involvement in any activities that may have taken place before January 17[th]. The jury was never asked to connect [Appellant] to any prior theft. The Commonwealth argued only that the jury should connect certain items with the January 17[th] burglary. The Commonwealth's efforts to connect

> these items to the January 17[th] burglary made it clear that, if the jury did not connect those items to the January 17[th] burglary, it should not connect them to [Appellant]. The Commonwealth's case for some of those items was certainly weaker than for the items James Lapic actually witnessed the conspirators taking, but the Commonwealth's presentation of a weak case does not constitute prejudice against [Appellant].
>
> The evidence [Appellant] argues should have been excluded was relevant to the Commonwealth's allegation that [Appellant] and his co-conspirators stole those items during the January 17[th] burglary. Its probative value outweighed its potential for prejudice, which was at best minimal, especially when considered next to [Appellant]'s own introduction of the August 2019 police report suggesting a prior break-in.

TCO at 10-12.

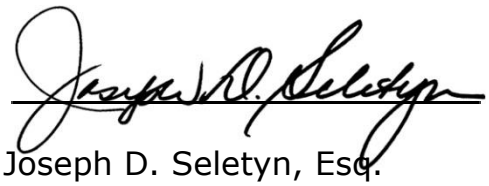
We agree with the trial court and conclude that Appellant has failed to demonstrate that it abused its discretion in admitting evidence regarding the items found at 212 Mercer Avenue. The Commonwealth did not introduce this evidence to suggest that Appellant was involved in the prior burglaries of Mr. Lapic's residence, but to prove that all or some of those items were taken during the burglary for which Appellant was on trial. As the court points out, it was Appellant who then introduced evidence alluding to the prior burglaries, including Officer Doerschner's 2019 police report. Appellant also elicited testimony from Mr. Lapic that he had called the police to his home on a prior occasion because someone had trespassed on his property. ***See*** N.T. Trial Vol. I at 119. Contrary to Appellant's argument that he was forced to elicit such evidence "to rebut an unfair inference that arose from the Commonwealth['s] introducing evidence of prior crimes," Appellant's Brief at 32, the transcripts demonstrate that the 2019 police report and testimony by

Mr. Lapic were elicited by defense counsel to show the dilapidated state of Mr. Lapic's residence and support Appellant's claim that the property was not adapted for overnight accommodation. ***See*** N.T. Trial Vol. I at 118-20, 151-52. We also agree with the trial court that Appellant failed to prove that he was prejudiced by the admission of the challenged evidence.

Given this record, and the reasons offered by the trial court for admitting the evidence concerning items found at 212 Mercer Avenue, Appellant has not demonstrated reversible error. Accordingly, his second issue does not warrant relief.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/19/2022