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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-301

Filed: 2 January 2018

Mecklenburg County, No. 14 CRS 201474

STATE OF NORTH CAROLINA, Plaintiff,

v.

BRAD CAYTON NORWOOD, Defendant.

Appeal by defendant from judgment entered 3 August 2016 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 November 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew L. Liles, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel L. Spiegel, for defendant-appellant.

ZACHARY, Judge.

Brad Norwood (defendant) appeals from the judgment entered upon his conviction of exploitation of an older adult. On appeal, defendant argues that the indictment charging him with this offense was defective, that the trial court committed plain error in instructing the jury, and that the court erred in sentencing

defendant. We conclude that defendant was charged in a valid indictment and that defendant has failed to establish the existence of plain error in the court's instructions, and we remand for correction of a clerical error.

Factual and Procedural Background

On 15 September 2014, defendant was indicted for exploitation of an older adult, in violation of N.C. Gen. Stat. § 14-112.2(b) (2016). At the trial of this matter, beginning on 25 July 2016, defendant did not testify or present evidence. The evidence offered by the State tended to show, in relevant part, the following: Ms. Ivene Painter testified that she was born in 1930 and currently lived in a retirement community. In 2013, she lived in a house in Mint Hill, North Carolina. She met defendant in the summer of 2013, after an incident in which Ms. Painter fell while walking to her mailbox and defendant helped her walk back to her house. After that day, Ms. Painter and defendant spent a lot of time together, including visiting each other's churches, eating out, and taking a trip to the beach. At some point, Ms. Painter gave defendant checks for $25,000 and $10,000, to enable defendant to build an outbuilding in her yard and to improve her bathroom. However, neither of these projects were completed. At the time of trial, Ms. Painter was unable to recall executing a power of attorney naming defendant as her attorney-in-fact, but she did recall asking him to return her money.

George Painter testified that he was Ms. Painter's nephew. In July of 2013, Ms. Cheryl White called Mr. Painter to express concern about Ms. Painter's memory loss. Mr. Painter visited Ms. Painter, who told him about her friendship with defendant and the trip they had taken to the beach. In November of 2013, Mr. Painter became concerned about defendant's relationship with Ms. Painter, and filed a petition seeking the appointment of a guardian for her. When an assistant clerk of court conducted a hearing on Mr. Painter's guardianship petition in November of 2013, Mr. Painter learned that Ms. Painter had written checks to defendant totaling $35,000, and that she had executed a power of attorney in which she named defendant as her attorney-in-fact. Following the hearing, Mr. Painter was appointed guardian of Ms. Painter's person, Attorney Stratford Kiger was appointed guardian of Ms. Painter's estate, and a no-trespassing order was entered barring defendant from entering onto Ms. Painter's property.

Ms. Cheryl White met Ms. Painter in 2011, when they were attending the same church. Ms. White assisted Ms. Painter with transportation, bookkeeping, and management of her medications. In 2013, Ms. Painter's cognitive skills and memory began to decline, and Ms. White contacted Mr. Painter to inform him of the problem. Ms. Painter met defendant in August of 2013, and in September she told Ms. White that defendant wanted to help her and that she would no longer need Ms. White's assistance. Ms. White was concerned about Ms. Painter's relationship with defendant

because of the age difference between them and the fact that defendant did not appear to have a job. Ms. White also testified that prior to the emergency guardianship hearing, defendant purchased a shower costing approximately $937 for installation in Ms. Painter's bathroom. After defendant was barred from the property, Ms. White and Mr. Painter completed the bathroom remodeling for an additional cost of $2,630.

Officer Kimmlingen of the Matthews Police Department testified that in 2013 he was an officer with the Mint Hill Police Department. He interviewed Ms. Painter and obtained a search warrant allowing him to view records from Ms. Painter's and defendant's bank accounts, and determined that money had been transferred from Ms. Painter's account to the account for Mint Hill Carolina, a business owned by defendant. Rocky Boone testified that he was an insurance agent and that Ms. Painter was one of his clients. In October of 2013, defendant mailed Mr. Boone a copy of Ms. Painter's power of attorney. In November of 2013, Ms. Painter told him that she feared that money had been stolen from her.

Attorney Michael Anderson testified that he was appointed to serve as Ms. Painter's guardian *ad litem* prior to the hearing on Mr. Painter's petition for appointment of a guardian for Ms. Painter. After being appointed Ms. Painter's guardian *ad litem*, Mr. Anderson met with her at her home. While Mr. Anderson was there, defendant called and Ms. Painter told him she was talking with an attorney who had been appointed to serve as her guardian *ad litem*. Mr. Anderson heard

defendant warn Ms. Painter in "a very foreboding" manner to "be careful what you tell him" and "[d]on't tell him too much." Ms. Painter also told Mr. Anderson that she was embarrassed that she had "given power of attorney to a man she just met," and complained to Mr. Anderson about defendant's ATM withdrawals from her bank account.

Following the presentation of evidence, the arguments of counsel, and the instructions from the trial judge, on 28 July 2016 the jury returned verdicts finding defendant guilty of exploitation of an older adult, and of obtaining funds or assets with a value of $20,000 or more as a result of this exploitation. On 3 August 2016, the trial court entered judgment against defendant. The court sentenced defendant to a prison term of thirteen to twenty-five months. The court ordered that the sentence would be suspended and defendant placed on supervised probation for 36 months, subject to the conditions that defendant serve a period of six months' imprisonment and that he complete 72 hours of community service. Defendant gave oral notice of appeal to this Court.

Indictment for Exploitation of an Older Adult

Defendant argues first that the indictment charging him with exploitation of an older adult was fatally defective, because it failed to state the specific nature of the deception in which defendant was alleged to have engaged. Defendant contends that, in the absence of an allegation specifying the deception, the indictment failed to

state all of the elements of the offense, and thus could not confer subject matter jurisdiction upon the trial court. We conclude that defendant has failed to establish that the indictment was invalid.

Requirements for Valid Indictment: Legal Principles

An indictment is "a written accusation by a grand jury, filed with a superior court, charging a person with the commission of one or more criminal offenses." N.C. Gen. Stat. § 15A-641(a) (2016). "As the Supreme Court has previously stated, '[i]t is elementary that a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony.' " *State v. Miranda*, 235 N.C. App. 601, 605, 762 S.E.2d 349, 353 (2014) (quoting *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981)). N.C. Gen. Stat. § 15A-924(a)(5) (2016) requires that an indictment contain "[a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation." Thus, "[a]n indictment is fatally defective if it wholly fails to charge some offense . . . or fails to state some essential and necessary element of the offense of which the defendant is found guilty." *State v. Partridge*, 157 N.C. App. 568, 570, 579 S.E.2d 398, 399 (2003) (internal quotation marks omitted).

However, "it is not the function of an indictment to bind the hands of the State with technical rules of pleading[.]" *Sturdivant*, 304 N.C. at 311, 283 S.E.2d at 731 (citation omitted). An "indictment must allege 'all the essential elements of the offense endeavored to be charged,' but it is generally sufficient if couched in the language of the statutory offense[.]" *State v. Spivey*, 368 N.C. 739, 742, 782 S.E.2d 872, 874 (2016) (quoting *State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600 (2003)).

"Lack of jurisdiction in the trial court due to a fatally defective indictment requires 'the appellate court . . . to arrest judgment or vacate any order entered without authority.' The issue of subject matter jurisdiction may be raised at any time, even for the first time on appeal." *State v. Barnett*, 223 N.C. App. 65, 68, 733 S.E.2d 95, 97-98 (2012) (quoting *State v. Petersilie*, 334 N.C. 169, 175, 432 S.E.2d 832, 836 (1993) (other citation omitted)). "The subject matter jurisdiction of the trial court is a question of law, which this Court reviews *de novo* on appeal." *Id.* (citation omitted).

Discussion

In the present case, defendant was indicted for exploitation of an older adult, in violation of N.C. Gen. Stat. § 14-112.2, which defines an "older adult" as a person 65 years of age or older and states that:

> (b) It is unlawful for a person: (i) who stands in a position of trust and confidence with an older adult or disabled adult . . . to knowingly, by deception or intimidation, obtain or use, or endeavor to obtain or use, an older adult's or disabled adult's funds, assets, or property with the intent to temporarily or permanently deprive the older adult or

> disabled adult of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the older adult or disabled adult.

Based upon our reading of the statute, we conclude that the elements of this offense are that the defendant:

> (1) stands in a position of trust and confidence with an older or disabled adult, and
> (2) knowingly, by deception or intimidation,
> (3) obtains, uses or attempts to obtain or use the funds, assets, or property of the older or disabled adult,
> (4) with the intent to temporarily or permanently deprive the older or disabled adult of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the older or disabled adult.

In this case, the indictment charging defendant with this offense stated that:

> [O]n or about and between the 1st day of August, 2013 and the 7th day of November, 2013, in Mecklenburg County, Brad Cayton Norwood unlawfully, willfully, and feloniously did knowingly, while standing in a position of trust and confidence with [Ivene] Painter, an elder adult within the meaning of G.S. 14-112.2(a), by deception obtain and use the funds, assets and property of [Ivene] Painter with the intent to deprive [Ivene] Painter of the use, benefit and possession of the funds, assets and property and benefit someone other than [Ivene] Painter. The value of the funds, assets and property was $37,000.

As discussed above, if a defendant is charged with "a statutory offense, the indictment is sufficient when it charges the offense in the language of the statute." *State v. Floyd*, 148 N.C. App. 290, 295, 558 S.E.2d 237, 241 (2002) (internal quotation

marks omitted). We conclude that defendant was charged in a valid indictment that stated all the elements of the offense and tracked the statutory language.

In urging us to reach a contrary conclusion, defendant contends that because the indictment "failed to state the nature of the alleged deception" the indictment omitted "a key element of exploitation of an elder adult" and "fail[ed] to provide the notice required by our State Constitution." The basis of defendant's argument is that (1) the offense of obtaining property by false pretenses is "a very similar crime," and (2) appellate cases have held that an indictment charging a defendant with obtaining property by false pretenses must include the false representation made by the defendant. We have carefully considered this argument, but do not find it persuasive.

Defendant is correct that "to sustain a charge of obtaining property by false pretenses, the indictment must state the alleged false representation." *State v. Braswell*, 225 N.C. App. 734, 740, 738 S.E.2d 229, 230 (2013) (citing *State v. Linker*, 309 N.C. 612, 614-15, 308 S.E.2d 309, 310-11 (1983)). Defendant does not, however, contend that the specificity required of an indictment charging a defendant with obtaining property by false pretenses is illustrative of a general rule governing indictments. In fact, defendant does not identify offenses other than obtaining property by false pretenses for which a similar rule has been imposed.

Moreover, our own review indicates numerous instances in which our appellate courts have held that an indictment for a particular offense was <u>not</u> required to state

specific evidentiary allegations. For example, in *State v. Worsley*, 336 N.C. 268, 443 S.E.2d 68 (1994), our Supreme Court considered the requirements for a valid indictment on a charge of burglary. Earlier cases held that an indictment for burglary must specify the felony that the defendant intended to commit. The Court held that this rule no longer applied after the enactment of N.C.G.S. § 15A-924(a)(5), and that the indictment at issue satisfied the requirements of N.C.G.S. § 15A-924(a)(5), despite the fact that it did not state the felony that the defendant intended to commit. *See also, e.g.*, *State v. Silas*, 360 N.C. 377, 381, 627 S.E.2d 604, 607 (2006) ("an indictment for felonious breaking or entering is not required to allege with specificity the felony a defendant intended to commit inside the building."); *State v. Garcia*, 358 N.C. 382, 597 S.E.2d 724 (2004) (indictment charging defendant with first-degree murder on a theory of felony murder not required to state the specific felony); *State v. Freeman*, 314 N.C. 432, 333 S.E.2d 743 (1985) (holding that an indictment charging a defendant with kidnapping to facilitate commission of a felony need not specify the felony that was facilitated by kidnapping the victims); *State v. Coker*, 312 N.C. 432, 438, 323 S.E.2d 343, 348 (1984) (because "[p]roof that defendant was impaired by one particular substance or another is a matter of evidence," an indictment for impaired driving did not need to state which substance impaired defendant); *State v. Edwards*, 305 N.C. 378, 380, 289 S.E.2d 360, 362 (1982) (holding that "an indictment which is drafted . . . without specifying which 'sexual act' was committed is sufficient to charge

the crime of first-degree sexual offense and to inform a defendant of such accusation."); and *State v. Collins*, 221 N.C. App. 604, 611, 727 S.E.2d 922, 927 (2012) (rejecting defendant's argument that an indictment for assault on a handicapped person must state the nature of the handicap). We conclude that the rule applicable to indictments for obtaining property by false pretenses is not illustrative of a general rule requiring that indictments include specific evidentiary allegations.

We also reject defendant's contention that the offense of exploitation of an older adult is "very similar" to that of obtaining property by false pretenses. The elements of obtaining property by false pretenses are set out in N.C. Gen. Stat. § 14-100(a) (2016), which provides that:

> If any person shall knowingly and designedly by means of any kind of false pretense whatsoever, whether the false pretense is of a past or subsisting fact or of a future fulfillment or event, obtain or attempt to obtain from any person within this State any money, goods, property . . . or other thing of value with intent to cheat or defraud any person of such money, goods, property . . . or other thing of value, such person shall be guilty of a felony.

The statute limits its ambit to situations in which a defendant employs a "false pretense" pertaining to "a past or subsisting fact or of a future fulfillment or event" in order to cheat the victim. In contrast, the offense of exploitation of an elder adult applies to any defendant who acts with "deception or intimidation," language that is much more general than that of the false pretenses statute. As defendant notes in

his brief, the "deception" might simply be that the defendant pretended a fondness and concern for the victim that he did not actually feel.

The question of whether a specific fact or circumstance is more properly categorized as an element of an offense that must be stated in an indictment, or as an evidentiary matter that may be omitted, requires the exercise of judgment and cannot be reduced to a simple bright-line rule. In the present case, we conclude that a valid indictment for exploitation of an older adult is not required to state specific instances of intimidation or examples of the defendant's deception, and that defendant is not entitled to relief on the basis of this argument.

Trial Court's Instructions to the Jury

Defendant's next argument is that the trial court committed plain error in its instructions to the jury on the offense of exploitation of an older adult. Defendant was charged in an indictment that alleged that he acted with deception. In its instructions to the jury, the trial court directed the jury to determine whether defendant acted with deception or intimidation. On appeal, defendant contends that this instruction "permitted the jury to convict [defendant] based on a theory that was not alleged in the indictment." We hold that, although the trial court erred by including the phrase "or intimidation" in its instructions, defendant has failed to show that this error rose to the level of plain error.

Defendant was charged in an indictment that alleged that "[defendant] . . . knowingly, while standing in a position of trust and confidence with [Ms. Painter] . . . by deception [did] obtain and use the funds, assets, and property of [Ms. Painter.]" In its instructions to the jury, the trial court stated that the jury should determine, *inter alia*, whether defendant "knowingly by deception or intimidation obtained or used" Ms. Painter's property or assets. " 'It is a well-established rule in this jurisdiction that it is error, generally prejudicial, for the trial judge to permit a jury to convict upon some abstract theory not supported by the bill of indictment.' " *State v. Tucker*, 317 N.C. 532, 537-38, 346 S.E.2d 417, 420 (1986) (quoting *State v. Taylor*, 301 N.C. 164, 170, 270 S.E.2d 409, 413 (1980)). We conclude that it was error for the court to instruct the jury that defendant could be convicted if the State proved that he had acted with "deception or intimidation."

Defendant concedes that he did not object to the trial court's instructions at trial and that, as a result, we review only for plain error. The standard of review for plain error has been established by our Supreme Court:

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. . . . Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal quotation marks and citations omitted).

"For plain error to be found, it must be probable, not just possible, that absent the instructional error the jury would have returned a different verdict." *State v. Juarez*, 369 N.C. 351, 358, 794 S.E.2d 293, 300 (2016) (citing *Lawrence, id.*) Moreover, "[p]lain error review places 'the burden . . . on the defendant to show that absent the error the jury probably would have reached a different verdict.' " *State v. Graham*, 223 N.C. App. 150, 154, 733 S.E.2d 100, 103 (2012) (emphasis added) (quoting *State v. Bellamy*, 159 N.C. App. 143, 147, 582 S.E.2d 663, 667 (2003)).

Where a defendant fails to object to an instruction that allows the jury to convict on a theory not stated in the indictment, the defendant must establish plain error on appeal. *State v. Martinez*, ___ N.C. App. ___, ___, 801 S.E.2d 356, 361 (2017) ("[U]nder [*State v.*] *Boyd*, [222 N.C. App. 160, 730 S.E.2d 193 (2012), *rev'd for the reasons stated in the dissenting opinion*, 366 N.C. 548, 742 S.E.2d 798 (2013),] a reviewing court is to determine whether a disjunctive jury instruction constituted reversible error, without being required in every case to assume that the jury relied on the inappropriate theory."). In the instant case, defendant makes the conclusory assertion that the trial court's error "was a fundamental error that denied [defendant] a fundamental right, an error affecting the integrity of our justice system." Defendant has not, however, offered any argument that, in the absence of the trial

court's error, the jury would probably have reached a different verdict. "It is not the job of this Court to make Defendant's argument for him." *State v. Joiner*, 237 N.C. App. 513, 522, 767 S.E.2d 557, 563 (2014) (citing *Viar v. N. Carolina Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) ("It is not the role of the appellate courts, however, to create an appeal for an appellant.")). We conclude that defendant has failed to establish the existence of plain error.

Sentence

Defendant's final argument is that the trial court erred in sentencing him. Defendant contends that the court's oral pronouncement of judgment contained an error of law and that the written judgment states a physically impossible condition of probation.

During the sentencing proceeding, the trial court sentenced defendant to a term of thirteen to twenty-five months' imprisonment, and then stated that "[t]he sentence is suspended on all the usual and regular conditions for a period of 36 months. This probation is to begin at the expiration of . . . his next release from custody." The court ordered defendant to pay restitution of $25,000, reimburse the State for the cost of his court-appointed attorney, remain employed if possible, submit to random urinalysis and warrantless searches, and have no contact with any of the State's witnesses. The court also prohibited defendant from engaging in any business transactions with persons over the age of 65 years during the period of probation.

After reciting the conditions of defendant's probation, the trial court directed that defendant "is to serve an active split sentence of six months in the Department of Corrections," to report to the probation office within 72 hours of his release, and to complete 72 hours of community service "within six months of the date of the first day of his probation."

On appeal, defendant directs our attention to the court's statement that defendant's probation would begin upon his release from custody. Defendant correctly notes that, if the trial court's phrasing is taken literally, it would result in defendant's being ordered to serve six months' imprisonment in addition to 36 months of supervised probation, which would not comply with the provisions of N.C. Gen. Stat. § 15A-1343(b1)(3) (2016), which states that a term of imprisonment may be imposed "during the probation" of a defendant. We conclude that it is likely that the court simply misspoke and that the trial court intended to order that defendant's term of imprisonment be suspended and defendant be placed on supervised probation for 36 months, serve a six month period of imprisonment during this 36 months, and complete 72 hours of community service within six months of his release.

We find support for this conclusion in the written judgment entered by the court. "[P]rior opinions of this Court have made clear that, as a general proposition, the written and entered order or judgment controls over an oral rendition of that order or judgment." *In re O.D.S.*, __ N.C. App. __, __, 786 S.E.2d 410, 417, *disc. review*

denied, __ N.C. __, 792 S.E.2d 504 (2016). Accordingly, we will base our determination of this issue upon the written judgment.

The trial court employed an Administrative Office of the Courts (AOC) form, AOC-CR-603C, to enter judgment against defendant. The court marked boxes on this form that correspond to its oral rendering of judgment, imposing a prison sentence of thirteen to twenty-five months, suspending the sentence and placing defendant on supervised probation for 36 months, with a special condition that defendant serve six months' imprisonment. The community service requirement was completed on the form as follows: "Complete 72 hours of community service during the first 180 days of the period of probation[.]" Defendant is correct that it is not possible for him to simultaneously serve a six month prison sentence and also to complete 72 hours of community service during that same six month period. Accordingly, we remand for correction of the clerical error in the judgment.

Conclusion

For the reasons discussed above, we conclude that defendant was charged in a valid indictment, that the court did not commit plain error in its instructions to the jury, and that the judgment entered against defendant should be remanded for correction of a clerical error.

NO ERROR IN PART, REMANDED IN PART.

Judges DAVIS and BERGER concur.

Report per Rule 30(e).