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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1269

Filed: 17 July 2018

Cleveland County, Nos. 16 CRS 51432-33

STATE OF NORTH CAROLINA

v.

MINDY MICHELLE MORROW

Appeal by defendant from judgment entered 18 May 2017 by Judge Robert C. Ervin in Cleveland County Superior Court. Heard in the Court of Appeals 16 July 2018.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Keith Clayton, for the State.*

*Julie C. Boyer for defendant-appellant.*

DAVIS, Judge.

Mindy Michelle Morrow (“Defendant”) appeals from her convictions for embezzlement and misdemeanor larceny. On appeal, Defendant argues that the trial court erred by denying her motion to dismiss the embezzlement charge. After a thorough review of the record and applicable law, we conclude that Defendant received a fair trial free from error.

### **Factual and Procedural Background**

The State presented evidence at trial tending to establish the following facts: Defendant was hired by Cleveland County Schools (“CCS”) as a teacher around 2004. In 2015, she was a seventh grade science teacher at Shelby Middle School. She was also responsible for the robotics program at the school, serving as a coach and instructor.

CCS purchased materials for the robotics program, including a First Lego League 2013 Nature’s Fury Mat (“Fury Mat”). Although new robotics mats were issued each year, mats from previous years were used for practice by teachers and students in subsequent years. Mats from previous years were never given away or disposed of. Materials for the robotics program were kept in the science rooms and Defendant had access to these materials as the robotics coach. Teachers were not permitted to take any of these items for their personal use.

In late November or early December 2015, Dr. Dustin Bridges, the principal of Shelby Middle School, found Defendant’s eBay account online and recognized various school items that Defendant was selling. Specifically, Dr. Bridges recognized several items from the robotics program, including a picture that was taken in Defendant’s classroom of the Fury Mat.

Dr. Bridges informed Jennifer Wampler, the Executive Director of Human Resources for CCS, of the situation and they met with Defendant on 7 December 2015.

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During this meeting, Defendant confirmed that the eBay account found by Dr. Bridges belonged to her. She denied selling any school robotics items on her eBay account and initially claimed that she purchased the Fury Mat listed on her eBay account at a flea market. Defendant told Wampler that although she did not possess the receipt for the Fury Mat from the flea market she could nevertheless prove the Fury Mat on her eBay account did not belong to the school. She stated that she knew where the Fury Mat belonging to the school was located and would show Wampler.

However, after searching her office at Shelby Middle School Defendant could not locate or produce the Fury Mat. She subsequently admitted that the Fury Mat that she sold on her eBay account belonged to the school. Defendant claimed that the previous robotics coach told her that because the Fury Mat was old she could do with it as she pleased. Defendant had not asked an administrator for permission to sell the Fury Mat.

On 9 May 2016, Defendant was indicted by a Cleveland County grand jury for (1) embezzling a black computer bag and a black Zagg keyboard; (2) embezzling the Fury Mat, two Lego EV3 touch sensors, and a Sony DVD MC10DVD burner with monitor; and (3) misdemeanor larceny of an Apple iPad. A jury trial was held beginning 16 May 2017 before the Honorable Robert C. Ervin.

At the close of the State's evidence, Defendant moved to dismiss all the charges. The trial court dismissed the first embezzlement charge in its entirety and

dismissed the second embezzlement charge as it related to the two Lego EV3 touch sensors and the Sony DVD MC10DVD burner with monitor. On 18 May 2017, the jury convicted Defendant of the remaining charges. The trial court consolidated the convictions and sentenced Defendant to a term of 5 to 15 months imprisonment, suspended the sentence, and placed her on supervised probation for 18 months. Defendant gave timely notice of appeal.

### **Analysis**

Defendant's sole argument on appeal is that the trial court erred by denying her motion to dismiss the embezzlement charge. She contends that the State failed to establish that the Fury Mat was entrusted to her in a fiduciary capacity and that she acted fraudulently or feloniously when she disposed of the Fury Mat. We disagree.

"A trial court's denial of a defendant's motion to dismiss is reviewed *de novo*." *State v. Watkins*, \_\_ N.C. App. \_\_, \_\_, 785 S.E.2d 175, 177 (citation omitted), *disc. review denied*, 369 N.C. 40, 792 S.E.2d 508 (2016). On appeal, this Court must determine "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[.]" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *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). Evidence must be viewed in the light most favorable to the State with every reasonable inference drawn in the State’s 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). “Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal.” *Smith*, 300 N.C. at 78, 265 S.E.2d at 169.

The essential elements of embezzlement are:

(1) the defendant, older than 16, acted as an agent or fiduciary for his principal, (2) he received money or valuable property of his principal in the course of his employment and through his fiduciary relationship, and (3) he fraudulently or knowingly and willfully misapplied or converted to his own use the money of his principal which he had received in a fiduciary capacity.

*State v. Britt*, 87 N.C. App. 152, 153, 360 S.E.2d 291, 292 (1987) (citation omitted), *disc. review denied*, 321 N.C. 475, 364 S.E.2d 924 (1988).

First, Defendant contends that there was insufficient evidence to satisfy the second element. She notes that the CCS robotics program was run by a third-party vendor prior to 2014, and argues that because the Fury Mat was used for the 2013-14 season she could not have received the Fury Mat as an agent or fiduciary of CCS.

Defendant seeks to rely upon our Supreme Court’s opinion in *State v. Weaver*, 359 N.C. 246, 607 S.E.2d 599 (2005). In *Weaver*, the defendant was charged with

multiple counts of aiding and abetting his wife to embezzle funds from his employer and for conspiracy to embezzle. The defendant's wife also worked as a receptionist for the same employer and was training to become the accounting manager. *Id.* at 247-48, 607 S.E.2d at 600. The defendant had directed his wife to write unauthorized checks payable to himself or his wife and to use the signature stamp of her supervisor to endorse the checks. *Id.* at 249, 607 S.E.2d at 600-01. The issue in *Weaver* was whether the funds that the defendant's wife misappropriated "were in her lawful possession or under her care and control such that defendant's [embezzlement-related convictions] may stand." *Id.* at 250-51, 607 S.E.2d at 601-602.

The Court stated that "[t]he person accused must have been entrusted with and *received into his possession lawfully* the personal property of another[.]" *Id.* at 255, 607 S.E.2d at 604. Because the evidence indicated that the wife did not have the independent authority to write checks from her employer's account or to use her supervisor's signature stamp, the Court determined that she merely had *access* to the checks and signature stamp by virtue of her status as an employee. *Id.* at 256, 607 S.E.2d at 605. Consequently, the Court concluded that the wife's possession of these items was not lawful and that the items were not under her care and control as required for purposes of North Carolina's embezzlement statute. *Id.*

The facts of the present case are readily distinguishable from those of *Weaver*. Here, it is undisputed that Defendant was an employee of CCS and that the Fury Mat

was purchased by CCS. Robotics mats that were used in previous years were retained for practice and never given away or discarded. In 2015, Defendant was responsible for the robotics program as a coach and instructor and was assigned all of the robotics materials. The Fury Mat was stored in Defendant's personal office at Shelby Middle School. Viewing this evidence in the light most favorable to the State, Defendant did not merely have *access* to the Fury Mat through her employment. Rather, she was assigned the robotics program materials and was in lawful possession of the Fury Mat.

Second, Defendant argues that the State failed to meet its burden of proving the third element of embezzlement. Defendant contends that because she was under the impression from the previous robotics coach that she could do as she pleased with the prior year's Fury Mat, the State failed to provide sufficient evidence of fraudulent or felonious intent. We disagree.

In establishing a defendant's fraudulent or knowing misapplication of property for purposes of embezzlement, "[s]uch intent may be shown by direct evidence, or by evidence of facts and circumstances from which it may reasonably be inferred." *State v. Morris*, 156 N.C. App. 335, 340, 576 S.E.2d 391, 395 (citation and quotation marks omitted), *cert. denied*, 357 N.C. 510, 588 S.E.2d 379 (2003). Here, several employees of CCS testified that robotics mats from previous years were retained by CCS and used for practice by teachers and students in subsequent years. They were never

given away or discarded. Furthermore, teachers were not permitted to take any of these items for their personal use.

Although Defendant initially claimed that she acquired the Fury Mat sold on her eBay account at a flea market, she later admitted that she had sold the Fury Mat belonging to the school. She also admitted that she had never asked an administrator for permission to take the Fury Mat for her own personal use. Thus, viewing the evidence in the light most favorable to the State it can be reasonably inferred that Defendant knew she was not permitted to sell the Fury Mat for her own financial gain and that she acted with the intent to defraud when she did so. Therefore, we hold that the State presented substantial evidence of the second and third elements of embezzlement. Accordingly, the trial court did not err in denying Defendant's motion to dismiss.

### **Conclusion**

For the reasons stated above, we conclude that Defendant received a fair trial free from error.

NO ERROR.

Judges CALABRIA and BERGER concur.

Report per Rule 30(e).