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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-308

Filed: 6 November 2018

Buncombe County, Nos. 15 CRS 89331, 89435, 16 CRS 266

STATE OF NORTH CAROLINA

v.

KEITHAN D. WHITMIRE

Appeal by defendant from judgments entered 28 July 2017 by Judge Marvin P. Pope, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 1 October 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

ARROWOOD, Judge.

Keithan D. Whitmire ("defendant") appeals from judgments entered on his convictions of forgery of instrument, uttering forged instrument, identity theft, and attaining habitual felon status. For the reasons stated herein, we find no error.

I. Background

On 2 May 2016, a Buncombe County Grand Jury indicted defendant on charges of forgery of instrument, uttering forged instrument, identity theft, and for attaining habitual felon status.

The matter came on for trial on 24 July 2017 in Buncombe County Superior Court, the Honorable Marvin P. Pope, Jr. presiding. The State's evidence tended to show as follows.

Ricky Rogers Auto Sales ("Ricky Rogers") is a car lot and check cashing business in Arden. On 27 July 2015, a Ricky Rogers cashier, Rebecca Rogers ("Rogers"), cashed a check for $619.35 that purported to be issued to Tyrone K. Young ("Young") by a UPS Store. Although the individual cashing the check presented identification bearing Young's name, Young testified at trial that he did not endorse or cash the check, or give anyone else permission to use his identification. Additionally, the owner of the UPS Store testified that the store did not issue the check.

The bank returned the check unpaid, and Ricky Rogers never recovered the money. Rogers contacted law enforcement, providing still pictures from Ricky Rogers' surveillance system. She later identified defendant as the individual that cashed the

check from a photo lineup, as did another employee who was present when the check was cashed.[1]

The trial court also admitted evidence pursuant to Rule 404(b) of the North Carolina Rules of Evidence, including testimony and reports from Asheville Police Detective Mike Downing ("Detective Downing") about statements that he took from defendant in 2006 and 2009, and testimony tending to show defendant committed the crimes of forgery and uttering of forged instruments at three additional businesses during the summer of 2015: Andy's Pak-n-Post, Envios Servicios Latinos, and Stanley's Citgo in Woodfin. Each of these businesses reported cashing fraudulent checks that purported to be issued to Tyrone K. Young by various businesses, although Young testified he never received any of these checks, cashed them, or gave anyone else permission to use his identification. Andy's Pak-n-Post's manager determined the check was not legitimate, and Envios Servicios Latinos and Stanley's Citgo's banks returned the checks unpaid.

On 28 July 2017, the jury found defendant guilty of all charges. The trial court consolidated the convictions for sentencing, and sentenced defendant to 84 to 113 months imprisonment.

Defendant appeals.

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[1] Rogers rated her certainty that defendant was the individual that cashed the check as a "10" on a scale of "1 to 10." However, she also rated her certainty that another one of the eight photos she was shown was the individual as an "8."

II. Discussion

Defendant argues the trial court erred by: (1) allowing Detective Downing to testify about highly prejudicial matters, and admitting the reports he wrote summarizing defendant's 2006 and 2009 statements pursuant to Rule 404(b), (2) allowing Detective Downing's reports to be read to the jury without defendant's acquiescence to the contents, (3) expressing an opinion on the evidence, (4) entering judgment on the forgery verdict when the indictment was insufficient to charge the offense, (5) admitting an excessive amount of Rule 404(b) evidence, and (6) instructing the jury on a theory of intent for identity theft that was not alleged in the indictment. We address each argument in turn.

A. Rule 404(b) Evidence

First, defendant argues the trial court erred by allowing Detective Downing to testify about highly prejudicial matters, and to read his 2006 and 2009 reports to the jury, which defendant argues were only relevant to show defendant's criminal propensity.

Defendant contends he preserved this error for appellate review pursuant to the rule set out in N.C. Gen. Stat. § 1A-1, Rule 46(a)(1) (2017) by making a general objection at the beginning of Detective Downing's testimony. *See* N.C. Gen. Stat. § 1A-1, Rule 46(a)(1) ("[W]hen there is objection to the admission of evidence involving a specified line of questioning, it shall be deemed that a like objection has been taken

to any subsequent admission of evidence involving the same line of questioning."). However, "[a] general objection will not come within Rule 46(a)(1) unless the line of questioning objected to is apparent to both the court and the parties." *Dep't of Transp. v. Fleming*, 112 N.C. App. 580, 586, 436 S.E.2d 407, 411 (1993) (citations omitted). In the record before our Court, the grounds of defendant's general objection are not clear. Therefore, defendant's arguments related to the admissibility of Detective Downing's testimony and his reports are unpreserved.

Nevertheless, we may review an issue on appeal that was not preserved by objection noted at trial in a criminal case "when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4) (2018). "[P]lain error review . . . is normally limited to instructional and evidentiary error." *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) (citation omitted). To show plain error, a "defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted). Accordingly, the error must have been "so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation and internal quotation marks omitted).

Defendant contends the trial court plainly erred by admitting Detective Downing's testimony and reports into evidence because the information testified to, including references to defendant's being arrested and jailed, giving a false name, receiving additional warrants and an additional bond, and related and pending charges and probation violations, was only relevant to show that defendant is a criminal and a liar. Therefore, he maintains it was inadmissible under Rule 404(b). We disagree.

Rule 404(b) provides that:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2017).

> Evidence is relevant if it has any logical tendency to prove a fact at issue in a case, . . . and in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible. It is not required that evidence bear directly on the question in issue, and evidence is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known, to properly understand their conduct or motives, or if it reasonably allows the jury to draw an inference as to a disputed fact.

State v. Stager, 329 N.C 278, 302, 406 S.E.2d 876, 889-90 (1991) (citation, internal quotation marks, and emphasis omitted). Additionally, "[t]he admissibility of

evidence under [Rule 404(b)] is guided by two further constraints—similarity and temporal proximity [of the acts]." *State v. Lloyd*, 354 N.C. 76, 88, 552 S.E.2d 596, 608 (2001) (citation and internal quotation marks omitted) (alteration in original).

Detective Downing's testimony related to defendant's 2006 and 2009 statements, and included reading the reports on each statement verbatim to the court. The first statement was given at defendant's request after he was served with warrants related to a check fraud ring investigation. According to the report, defendant told Detective Downing that he met two members of a check fraud ring in 2006. One of the members told him "he was looking for local people to employ" for a new company, and offered defendant money to assist "in finding people" with drivers licenses or identification cards to cash checks. Defendant recruited people for this purpose, but claimed he did not know the check fraud ring's work was illegal until he had been involved "too long to back out." However, he maintained "he did not have anything to do with the actual cashing of checks."

In 2009, Detective Downing had another occasion to interview defendant while investigating a counterfeit check ring. During the interview, defendant denied any involvement in fraudulent activity "involving counterfeit checks since his release from prison." He explained that, although he continued to spend time with people involved in check cashing operations, it was only because they paid him to "just hang[ ] around."

Having reviewed the relevant testimony, we hold that Detective Downing's testimony and reports, admitted as Rule 404(b) evidence, were relevant as indicative of defendant's knowledge of the crime of forgery of instruments and uttering forged instruments. Therefore, the trial court did not admit the Rule 404(b) evidence solely to show defendant's criminal propensity. The trial court also found defendant's prior conduct was substantially similar and temporal to the conduct alleged. In light of these findings, the trial court did not err by admitting the Rule 404(b) evidence. Because the trial court did not err, defendant cannot show plain error.

B. Detective Downing's 2006 and 2009 Reports

Next, defendant argues the trial court plainly erred by allowing Detective Downing to read his reports to the jury, and by admitting the reports into evidence, without defendant's acquiescence to the reports' contents. Defendant alleges plain error because he did not object on this basis at trial. N.C.R. App. P. 10(a)(2), (a)(4).

Defendant's argument that the reports were unlawfully admitted into evidence relies on *State v. Walker*, 269 N.C. 135, 152 S.E.2d 133 (1967). In *Walker*, our Supreme Court held that a statement given by an individual accused of a crime, reduced to writing by another person, is not admissible as a written confession, and thus cannot be read verbatim to the jury, unless the accused indicates his agreement with the writing's correctness. *Id.* at 139, 152 S.E.2d at 137 (citation omitted).

Assuming *arguendo* that admission of the reports prepared by Detective Downing were in error, we are not persuaded that any error stemming from the admission "had a probable impact on the jury's finding of guilt." *Lawrence*, 365 N.C. at 517, 723 S.E.2d at 334 (citation, internal quotation marks, and emphasis omitted). Apart from the reports, there was ample evidence tending to show defendant's guilt, including photographs of the transaction at Ricky Rogers, the testimony of two eyewitnesses identifying defendant, and additional Rule 404(b) evidence tending to show defendant committed the crimes of forgery and uttering of forged instruments at other businesses in a similar manner. Therefore, any error that may have occurred through the trial court's admission of the reports did not rise to the level of plain error.

C. Opinion on the Evidence

Defendant argues the trial court erred by expressing an opinion on the evidence when it instructed the jury on the evidence admitted pursuant to Rule 404(b).

It is well established that a trial judge may not express "an opinion as to whether or not a fact has been proved" when instructing the jury. N.C. Gen. Stat. § 15A-1232 (2017); *see* N.C. Gen. Stat. § 15A-1222 (2017); *see also State v. Blackstock*, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985). "Whenever a defendant alleges a trial court made an improper statement by expressing an opinion on the evidence in

violation of [N.C. Gen. Stat.] §§ 15A-1222 and 15A-1232, the error is preserved for review without objection due to the mandatory nature of these statutory provisions." S*tate v. Duke*, 360 N.C. 110, 123, 623 S.E.2d 11, 20 (2005) (citation omitted).

Here, the trial court instructed the jury on the Rule 404(b) evidence as follows:

> Evidence has been received *tending to show* that the defendant has committed the crimes of forgery and uttering of forged instruments with other persons or entities. This evidence was received solely for the purpose of showing the identity of the person who committed the crime charged in this case, if one or more was committed; that the defendant had a motive for the commission of the crimes charged in this case; that the defendant had the intent, which is a necessary element of the crimes charged in this case; that the defendant had the knowledge, which is a necessary element of the crimes charged in this case; that there existed in the mind of the defendant a plan, scheme, system, or design involving the crimes charged in this case; that the defendant had the opportunity to commit the crimes.
>
> If you believe this evidence you may consider it, but only for the limited purpose for which it was received. You may not consider it for any other purpose.

(Emphasis added). The trial court further instructed: "The law requires the presiding judge to be impartial. You should not infer from anything I have done or said that the evidence is to be believed or disbelieved, that a fact has been proved, or what your findings ought to be."

Defendant argues the trial court expressed an opinion by stating evidence had been received "tending to show" the crimes of forgery and uttering forged instruments

occurred. However, our Supreme Court has previously held that the use of the words "tending to show" in reviewing the evidence does not constitute an expression of the trial court's opinion. *See State v. Young*, 324 N.C. 489, 495, 380 S.E.2d 94, 97 (1989) (citations omitted). Therefore, the trial court's instruction on the Rule 404(b) evidence did not express an opinion on the evidence. Defendant's argument is without merit, and the trial court did not err.

D. Sufficiency of the Forgery Indictment

Defendant argues the forgery indictment was insufficient to support a judgment because it failed to allege the person or entity defendant intended to defraud. We disagree.

"[W]e review the sufficiency of an indictment *de novo*." *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009) (citation omitted). To be sufficient to support a judgment, "an indictment must charge all of the essential elements of the alleged criminal offense." *State v. King*, 178 N.C. App. 122, 128, 630 S.E.2d 719, 723 (2006) (citation omitted).

N.C. Gen. Stat. § 14-119(a) (2017), the statutory basis for the forgery charge in this case, provides: "[i]t is unlawful for any person to forge or counterfeit any instrument, or possess any counterfeit instrument, with the intent to injure or defraud any person, financial institution, or governmental unit." *Id.*

> In any case where an intent to defraud is required to constitute the offense of forgery, or any other offense

> whatever, it is sufficient to allege in the indictment an intent to defraud, *without naming therein the particular person or body corporate intended to be defrauded*. . . .

N.C. Gen. Stat. § 15-151 (2017) (emphasis added). Accordingly, "[t]he crime of forgery requires allegations of three elements: (1) . . . a false making or alteration of some instrument in writing; (2) . . . fraudulent intent; and (3) the instrument must be apparently capable of effecting a fraud." *King*, 178 N.C. App. at 128, 630 S.E.2d at 723 (citation and internal quotation marks omitted).

The indictment at issue charged:

> [t]he defendant . . . unlawfully, willfully and feloniously did forge and counterfeit an instrument, a check drawn on a bank, JP Morgan Chase Bank, NA, which is described as follows: Check # 12411910 drawn on account # 6301487579509 of The UPS Store #6142, made payable to Tyrone K. Young in the amount of $619.35 and dated 07/23/2015. The forgery and counterfeiting consisted of the following: the defendant created and forged a counterfeit check without authorization of The UPS Store #6142. The defendant acted without authority and with the intent to injure and defraud.

Defendant avers this language cannot support the crime of forgery because it failed to allege the person or entity defendant intended to defraud. However, it is not necessary for the State to name "the particular person or body corporate" intended to be defrauded in a forgery indictment. *See* N.C. Gen. Stat. § 15-151; *King*, 178 N.C. App. at 128, 630 S.E.2d at 723. Therefore, the indictment at issue is not fatally defective, and the trial court did not err by entering judgment on the forgery charge.

E. Amount of 404(b) Evidence

Defendant also argues the trial court erred by admitting an excessive amount of Rule 404(b) evidence. However, he failed to preserve this argument because he did not make "a timely request, objection, or motion" to preserve the issue for appeal. N.C.R. App. P. 10(a)(1). Although an unpreserved evidentiary error may be raised on appeal when an appellant specifically and distinctly alleges plain error, defendant failed to contend plain error as to this issue. *See* N.C.R. App. P. 10(a)(4). Instead, defendant requests our Court invoke Rule 2 of the North Carolina Rules of Appellate Procedure to review this argument.

Rule 2 permits our Court to exercise our discretion to suspend or vary other rules of appellate procedure "[t]o prevent manifest injustice." N.C.R. App. P. 2 (2018). We should only exercise this discretion "rarely and in exceptional circumstances." *State v. Gayton-Barbosa*, 197 N.C. App. 129, 134, 676 S.E.2d 586, 589 (2009) (citations and internal quotation marks omitted). We hold that this case does not involve exceptional circumstances, and we decline to exercise our discretion to invoke Rule 2.

F. Identity Theft Jury Instruction

In his final argument on appeal, defendant argues the trial court erred by instructing the jury on a theory of intent for identity theft that was not alleged in the indictment. However, this issue was not preserved for our review.

Prior to the charge conference, the trial court gave the parties a copy of the proposed instructions, apparently including the pattern instruction on identity theft. The pattern instruction on identity theft provides the State must prove two elements beyond a reasonable doubt:

> First, that the defendant [obtained] [possessed] [used] personal identifying information of another person. (*Name type of identifying information, e.g., social security number*) would be personal identifying information.
>
> And Second, that the defendant acted knowingly and with the intent to fraudulently represent that the defendant was that other person for the purpose of [making [financial] [credit] transactions in the other person's name] [obtaining anything of [value] [benefit] [advantage]] [avoiding legal consequences].
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant [obtained] [possessed] [used] personal identifying information of another person and that the defendant did so knowingly, with the intent to fraudulently represent that the defendant was that other person for the purpose of [making [financial] [credit] transactions in that other person's name] [obtaining anything of [value] [benefit] [advantage]] [avoiding legal consequences], it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

N.C.P.I. – Crim. 219B.80, Identity Theft (2018) (footnotes omitted).

At the charge conference, the State pointed out that "in the identity theft charge, the Court has, 'for the purpose of avoiding legal consequences' " as a theory of intent for the second element of identity theft, even though the indictment listed a

different theory of intent, "for the purpose of financial transactions[.]" The State requested the instruction for the second element read "for the purpose of making financial transactions." Defendant did not object or request this instruction, but instead requested the court simplify the language "and obtaining anything of value, benefit, or advantage, to wit, cashing counterfeit checks made payable to Tyrone Young" in the instruction on the second element. In accordance with defendant's request, trial court agreed to instruct the jury on the second element as follows:

> And second, that the defendant acted knowingly and with intent to fraudulently represent that the defendant was that other person for the purpose of making financial transactions in the person's name, to wit, Tyrone Young, and obtaining anything of value[.]

The trial court instructed the jury, in pertinent part, as follows:

> First, that the defendant obtained, possessed and/or used personal identifying information of another person, to wit, the state-issued North Carolina driver['s] license of Tyrone Young. A state-issued driver['s] license would be personal identifying information.
>
> *And second, that the defendant acted knowingly and with the intent to fraudulently represent that the defendant was that other person for the purpose of making financial transactions in the person's name, to wit, Tyrone Young, and obtaining anything of value.* If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant obtained, possessed, and/or used personal identifying information of another person and that the defendant did so knowingly with the intent to fraudulently represent that the defendant was that other person for the purpose of avoiding legal consequences or making financial transactions, it would be your duty to

> return a verdict of guilty.

(Emphasis added). Thus, the trial court instructed the second element as agreed upon at the trial conference, and then gave the final mandate as put forth in the pattern jury instructions. Defendant never requested particular language with the final mandate for identity theft at the charge conference, nor objected after the instructions were given. Therefore, defendant failed to preserve his argument that the trial court erred in its final mandate on identity theft. *See* N.C.R. App. P. 10 (a)(2). Defendant did not specifically and distinctly argue that this purported error constituted plain error, therefore we need not address the merits of this argument. *See* N.C.R. App. P. 10(a)(4).

III. Conclusion

For the reasons discussed, the trial court did not commit error.

NO ERROR.

Chief Judge MCGEE and Judge ELMORE concur.

Report per Rule 30(e).