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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-660

Filed: 26 March 2019

Wake County, No. 16 CRS 221930

STATE OF NORTH CAROLINA

v.

ZAQUELL SHABAZZ HOWARD

Appeal by defendant from judgment entered 11 January 2018 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 26 February 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Phyllis A. Turner, for the State.

Mary McCullers Reece, for defendant-appellant.

DAVIS, Judge.

Zaquell Shabazz Howard ("Defendant") appeals his conviction for transportation or possession of five or more counterfeit instruments pursuant to N.C. Gen. Stat. § 14-119(b). After a thorough review of the record and applicable law, we vacate in part and remand for further proceedings.

Factual and Procedural Background

The State's evidence at trial tended to show the following: On or about 9 November 2016, shortly before midnight, Officer Richard Sirianna with the City of Raleigh Police Department was traveling in a marked patrol car on Carolina Pines Avenue when he observed Defendant driving a white Ford Crown Victoria that lacked operating taillights. When Officer Sirianna turned the patrol car around to follow the vehicle, its driver made a fast left turn and proceeded to park on Oak Street.

Officer Sirianna stopped his patrol vehicle and approached the driver's side of the Crown Victoria. He observed that Defendant was seated in the driver's seat, a woman was in the front passenger seat, and a small child in an unfastened car seat was present in the back of the car. When Officer Sirianna asked Defendant to produce his driver's license, he noticed that Defendant appeared to be nervous. After learning from Defendant that he was on probation, Officer Sirianna asked him to exit the vehicle. Officer Sirianna then noticed an odor of marijuana emanating from the trunk of the car and conducted a search of the vehicle. He found "18 bags of marijuana in a hydraulic jack box in the trunk and 13 counterfeit bills in the glove box," including eleven counterfeit $10 bills and two counterfeit $50 bills. Officer Sirianna subsequently placed Defendant under arrest.

On 27 June 2017, Defendant was indicted by a grand jury on charges of possession with intent to sell or deliver marijuana, maintaining a vehicle for controlled substances, transportation or possession of five or more counterfeit

instruments, and misdemeanor child abuse. A jury trial was held before the Honorable Henry W. Hight, Jr. beginning on 10 January 2018 in Wake County Superior Court. The State presented testimony from three witnesses, including Officer Sirianna, Officer Jeffrey Malzan, and forensic drug analyst Amanda Abernathy with the Raleigh Wake City-County Bureau of Investigation. Defendant offered testimony from Marquis McLean, who witnessed and filmed Defendant's interactions with Officers Sirianna and Malzan.

At the close of the State's evidence, Defendant moved for dismissal of all charges. The trial court granted his motion to dismiss as to the charges of misdemeanor child abuse and maintaining a vehicle for controlled substances and denied the motion as to the charges of possession with intent to sell or deliver marijuana and possession or transportation of five or more counterfeit instruments. At the close of all the evidence, Defendant renewed his motion to dismiss the remaining two charges, and the trial court denied his motion. That same day, the jury returned a verdict of guilty as to both charges. Defendant was sentenced to 15 to 26 months imprisonment. Defendant gave timely notice of appeal to this Court.

Analysis

On appeal, Defendant's sole argument is that the trial court erred in denying his motion to dismiss the charge of transportation or possession of five or more

counterfeit instruments.[1] "A trial court's denial of a defendant's motion to dismiss is reviewed de novo." *State v. Watkins*, 247 N.C. App. 391, 394, 785 S.E.2d 175, 177 (citation omitted), *disc. review denied*, __ N.C. __, 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 defendant's evidence, unless favorable to the State, is not to be taken into consideration. However, if the defendant's evidence is consistent with the State's evidence, then the defendant's evidence may be used to explain or clarify that offered by the State." *State v. Nabors*, 365 N.C. 306, 312, 718 S.E.2d 623, 627 (2011) (internal citation and quotation marks omitted).

[1] Therefore, he has waived his right to challenge his remaining conviction.

N.C. Gen. Stat. § 14-119(b) provides that "[a]ny person who transports or possesses five or more counterfeit instruments with the intent to injure or defraud any person, financial institution, or governmental unit is guilty of a Class G felony." N.C. Gen. Stat. § 14-119(b) (2017). For crimes requiring an intent to defraud as an essential element, "it is not essential that any person be actually defrauded," but the State must provide sufficient evidence that the defendant possessed the intent to defraud in order to properly raise a jury issue. *See State v. Williams*, 291 N.C. 442, 447, 230 S.E.2d 515, 518 (1976) (addressing prior version of N.C. Gen. Stat. § 14-119 governing forgery). "Intent is a mental attitude which seldom can be proved by direct evidence, but must ordinarily be proved by circumstances from which it can be inferred." *State v. Greene*, 12 N.C. App. 687, 689, 184 S.E.2d 523, 525 (1971) (citation and quotation marks omitted), *appeal dismissed*, 280 N.C. 303, 186 S.E.2d 177 (1972).

Our Supreme Court has held that intent to defraud may be inferred when an individual "is found in possession of a forged instrument and is endeavoring to obtain money or advances upon it[.]" *State v. Welch*, 266 N.C. 291, 295, 145 S.E.2d 902, 905 (1966) (citation and quotation marks omitted). The State may also demonstrate a defendant's intent to defraud by providing evidence "that the defendant, about the same time, had passed other counterfeit money of like kind." *State v. Beam*, 184 N.C. 730, 734, 115 S.E.2d 176, 178 (1922) (emphasis omitted).

Here, even taking the evidence in the light most favorable to the State, we conclude that the State has failed to provide sufficient evidence that Defendant possessed the intent to defraud. Because there is a paucity of cases from our appellate courts on this element of the offense, we find instructive cases addressing this issue under a similar federal statute. In *United States v. McCall*, 592 F.2d 1066 (9th Cir. 1979), *cert. denied*, 441 U.S. 936, 60 L. Ed. 2d 665 (1979), the defendant was convicted of possession of counterfeit bills in violation of 18 U.S.C. § 472, which requires that a defendant have the "intent to defraud." 18 U.S.C. § 472 (2012). The defendant in *McCall* attempted to pay for a meal at a restaurant with a counterfeit $100 bill, but a manager called the police. An officer arrived and asked the defendant "how he had obtained [the bill] and whether [he] had others." *McCall*, 592 F.2d at 1067. The defendant initially claimed to have received the bill after cashing a check and that he did not have any others, but a search subsequently revealed that he possessed "$ 257 in lawful currency in one pocket and two counterfeit $ 100 bills in another." *Id.*

The court determined that "[t]here was sufficient evidence to support the conviction" because the defendant: (1) "gave inconsistent exculpatory statements concerning the source of the bills"; (2) "denied having more counterfeit bills when questioned at the restaurant, although he had two of them"; (3) "had earlier used $ 100 bills to buy goods"; and (4) kept the counterfeit bills separate from his legitimate currency. *Id.* at 1068.

The defendant in *United States v. Leftenant*, 341 F.3d 338 (4th Cir. 2003), was also charged with possession of counterfeit bills in violation of 18 U.S.C. § 472 after he attempted to use a counterfeit $20 bill at a restaurant. The evidence showed that a counterfeit bill had fallen out of the defendant's pocket in the presence of a police officer, who testified that the defendant "had a shocked look on his face." *Leftenant*, 341 F.3d at 347. In addition, "the Government discredited [the defendant's] explanation of how he came into possession of the counterfeit bills." *Id.* The court held that "[i]n these circumstances, the jury was entitled to find that [the defendant] . . . intended to use [the counterfeit bills] to defraud." *Id.*

In *United States v. Acosta*, 972 F.2d 86 (5th Cir. 1992), the court determined that there was sufficient evidence that the defendant had the requisite intent to defraud in order to support his convictions under 18 U.S.C. § 472. The Court held that evidence of the defendant's numerous transactions using counterfeit $20 bills — even after a cashier informed him that one of the bills was fake — in addition to the fact that the defendant's brother had been charged with passing identical counterfeit $20 bills was sufficient to support a jury finding that he possessed the intent to defraud. *Acosta*, 972 F.2d at 89.

Here, the State argues the mere fact that Defendant possessed the counterfeit bills in the glove compartment of his car was sufficient evidence from which a jury could infer an intent to defraud. There is no evidence, however, that Defendant ever

attempted to use the bills as currency. We note that the bills were not even in his wallet. In addition, he did not give conflicting accounts to the police as to how he obtained the bills, and there was no evidence that he previously used or attempted to use counterfeit currency.

An intent to defraud is a necessary element of this offense, meaning that mere possession is not — by itself — sufficient to support a conviction. The State simply did not provide any evidence satisfying that additional element. A contrary ruling would render the "intent to defraud" element meaningless and allow for a finding of guilt based solely upon evidence of possession of counterfeit instruments.

Therefore, the trial court improperly denied Defendant's motion to dismiss as to that charge. *See State v. Parker*, 146 N.C. App. 715, 718, 555 S.E.2d 609, 611 (2001) (vacating conviction where State failed to provide sufficient evidence as to essential element of crime).

Conclusion

For the reasons stated above, we vacate Defendant's conviction of transportation or possession of five or more counterfeit instruments and remand to the trial court for resentencing on Defendant's remaining conviction.

VACATED IN PART AND REMANDED WITH INSTRUCTIONS.

Chief Judge McGEE and Judge DIETZ concur.

This opinion was authored by Judge Davis prior to 25 March 2019.

Report per Rule 30(e).