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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-81

Filed: 1 October 2019

New Hanover County, No. 17 CRS 52236

STATE OF NORTH CAROLINA

v.

DAVID C. LONG

Appeal by defendant from judgment entered 24 August 2018 by Judge James S. Carmical in New Hanover County Superior Court. Heard in the Court of Appeals 5 September 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General Nora F. Sullivan, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for defendant.*

ARROWOOD, Judge.

David C. Long (“defendant”) appeals from judgment entered upon his conviction for failing to work after being paid. For the following reasons, we find no error.

I. Background

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On 27 March 2017, defendant was arrested on a warrant charging him with obtaining property by false pretenses and failing to work after being paid. On 22 June 2017, a New Hanover County Grand Jury indicted defendant on one count of obtaining property by false pretenses and on one count of failing to work after being paid. Defendant's case came on for trial in New Hanover County Superior Court before the Honorable James S. Carmical on 23 August 2018.

At trial, the State's evidence tended to show the following. Defendant had been a close friend of Kathryn Borland ("Ms. Borland") through her husband for several years. After the death of Ms. Borland's husband in 2012, defendant often assisted her with household chores and errands. Ms. Borland testified that she considered defendant to be a reliable friend. In 2014, Ms. Borland decided to sell her home and hired defendant, a professional contractor, to make repairs necessary to put the house on the market. Once Ms. Borland's home was sold, defendant helped her move and placed her possessions in a storage unit until her new home was ready.

Based on their past dealings, Ms. Borland and defendant entered into a series of ten agreements for remodeling work on Ms. Borland's new residence beginning in October 2014. With the exception of their first agreement, these agreements followed a pattern of defendant submitting an invoice to Ms. Borland for proposed contract work, Ms. Borland paying the invoice by check on the same day, and defendant subsequently cashing the check and completing the proposed work in full.

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Their first agreement entered on 15 October 2014 followed this same pattern, except that defendant never completed three of the seven items for which he invoiced and was paid by Ms. Borland: replacing the roof, repairing a skylight, and replacing a microwave. Ms. Borland testified that she frequently asked defendant about his progress on the roof replacement, to which defendant responded with a series of excuses for why the subcontractor he hired had not yet performed the work. On one occasion, Ms. Borland accompanied defendant to pick out materials for the new roof, but they were never delivered to her residence. Defendant never purchased any materials or commenced any other work related to the roof, skylight, or microwave. Nor did he ever refund the funds paid for these three items.

Ms. Borland testified that in June of 2015, defendant admitted that he had given the entire \$6,800.00 she paid him for the roof to a roofing subcontractor who absconded with the funds. Defendant provided Ms. Borland no further explanation or details regarding this failure, nor did he return the funds. Ms. Borland eventually had to hire other contractors to complete the work on the roof, skylight, and microwave. The new roofing contractor determined that Ms. Borland's skylight did not need to be replaced.

In 2016, Ms. Borland began moving her belongings from her storage unit to her new residence. She noticed certain items missing from the unit and confronted defendant, who stated that it must have been another person to whom defendant had

given the keys. In December 2016, Ms. Borland called the police to investigate her missing property from the storage unit. Detective Robinson of the New Hanover County Sheriff's Office was assigned to investigate the complaint.

While Detective Robinson was unable to find sufficient evidence to charge defendant for the theft of the missing items, he testified that the investigation quickly turned to the issue of defendant's failure to perform the work on the roof, skylight, and microwave. He testified that defendant said that he had paid a subcontractor to do the roofing work, but the subcontractor had failed to do the work. Defendant further stated that he was physically unable to complete the work on the roof, skylight, and microwave. Defendant also told Detective Robinson that he had done other work to make up for the incomplete roof. Though requested, defendant never provided Detective Robinson with the name of the roofing subcontractor who allegedly absconded with Ms. Borland's money or evidence of the additional work.

At the close of the State's evidence, defendant moved to dismiss the charges of obtaining property by false pretenses and failing to work after being paid, on grounds of insufficient evidence to convict. The trial court denied defendant's motion. Defendant then presented evidence from two subcontractors who testified that they had performed work on Ms. Borland's house under defendant and defendant always paid them for their work. Defendant did not renew his motion to dismiss at the close of all the evidence.

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On 24 August 2018, the jury returned verdicts finding defendant guilty of failing to work after being paid and not guilty of obtaining property by false pretenses. After the jury returned its verdicts, but prior to the entry of judgment, defendant's counsel gave oral notice of appeal. Prior to the entry of the judgement, defendant moved to set aside the verdict for insufficient evidence and lack of due process. The trial court denied the motion. The court then entered judgment sentencing defendant to 45 days imprisonment, suspended on the condition of 24 months of supervised probation. The court also ordered defendant to pay Ms. Borland \$7,549.00 in restitution, the value of the items for which he was convicted for failing to work after being paid.

II. Discussion

On appeal, defendant raises challenges to the trial court's denial of his motion to dismiss for insufficient evidence, jury instructions, and order of restitution. Defendant's notice of appeal was defective under N.C.R. App. P. 4(a)(1) (2017) for failure to give oral notice of appeal after entry of judgment. Defendant has filed with this Court a Petition for *Writ of Certiorari* which, in our discretion, we grant to determine the matter on the merits.

A. Motion to Dismiss

Defendant first argues the trial court erred in denying his motion to dismiss for insufficient evidence. As an initial matter, we must determine whether defendant has preserved this assignment of error on appeal.

When a defendant in a criminal case makes a motion to dismiss for insufficient evidence “after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, defendant’s motion for dismissal . . . made at the close of State’s evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.” N.C.R. App. P. 10(a)(3) (2017). In such circumstances, “if a defendant fails to move to dismiss the action[ ] . . . at the close of all the evidence, defendant may not challenge on appeal the sufficiency of the evidence to prove the crime charged.” *Id.*

This Court has recognized that when a defendant fails to renew an earlier motion to dismiss for insufficient evidence, the defendant nonetheless preserves this motion for appeal when the defendant moves to “set aside the verdict for lack of evidence and for legal errors” after return of a guilty verdict but before entry of judgment, as the latter motion is more properly characterized as a motion to dismiss under N.C. Gen. Stat. § 15A-1227(a)(3). *State v. Stroud*, 252 N.C. App. 200, 207-208, 797 S.E.2d 34, 40-41 (citing *State v. Mercer*, 317 N.C. 87, 99-100, 343 S.E.2d 885, 893 (1986)), *appeal dismissed, disc. rev. denied*, 369 N.C. 754, 799 S.E.2d 872 (2017).

“A motion for dismissal for insufficiency of the evidence to sustain a conviction may be made . . . [a]fter return of a

verdict of guilty and before entry of judgment.” N.C. Gen. Stat. § 15A-1227(a)(3) (2015). The statute also specifically provides that a “[f]ailure to make the motion at the close of the State’s evidence or after all the evidence is not a bar to making the motion at a later time,” and that “[t]he sufficiency of all evidence introduced in a criminal case is reviewable on appeal without regard to whether a motion has been made during trial[.]” N.C. Gen. Stat. §§ 15A-1227(b), (d) (2015).

*Stroud*, 252 N.C. App. at 208, 797 S.E.2d at 41 (alterations in original).

In the instant case, defendant made a motion to dismiss for insufficient evidence at the close of the State’s evidence. The trial court denied this motion, defendant subsequently presented his own evidence, and defendant did not renew this motion later in the trial court proceedings. However, after the jury returned a verdict of guilty, defendant made a motion to set aside the verdict for insufficient evidence before entry of judgment. Pursuant to *Stroud* and *Mercer*, we interpret this motion as a renewed motion to dismiss per N.C. Gen. Stat. § 15A-1227(a)(3). Therefore, defendant has preserved this assignment of error on appeal and we consider the merits of his argument.

“This Court reviews the trial court’s denial of a motion to dismiss *de novo*.” *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). “‘Upon defendant’s motion for dismissal, the question for the Court is 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 of such

offense. If so, the motion is properly denied.’” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *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). “In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). “The trial court is not required to determine that the evidence excludes every reasonable hypothesis of innocence before denying a defendant’s motion to dismiss.” *State v. Barfield*, 127 N.C. App. 399, 401, 489 S.E.2d 905, 907 (1997) (citation omitted).

One of the essential elements of the crime of failing to work after being paid is that the defendant acted with the intent to cheat or defraud the victim at the time the defendant received an advance of monetary value. See N.C. Gen. Stat. § 14-104 (2017) (“If any person, with intent to cheat or defraud another, shall obtain any advances in money, provisions, goods, wares or merchandise of any description from any other person or corporation upon and by color of any promise or agreement that the person making the same will begin any work or labor of any description for such



person or corporation from whom the advances are obtained, and the person making the promise or agreement shall willfully fail, without a lawful excuse, to commence or complete such work according to contract, he shall be guilty of a Class 2 misdemeanor.”).

“The State must prove defendant did not intend to begin work at the time he received the advances (of money or provisions, etc.) but used the promise [to work] as an artifice or fraud for the sole purpose of obtaining the advancements. Intent is a state of mind and usually must be inferred from circumstantial evidence.” *State v. Octetree*, 173 N.C. App. 228, 230, 617 S.E.2d 356, 358 (2005) (alterations in original) (internal quotation marks and citations omitted) (citing *State v. Griffin*, 154 N.C. 611, 613, 70 S.E. 292, 292-93 (1911) and *State v. Liberato*, 156 N.C. App. 182, 186, 576 S.E.2d 118, 120 (2003)). “In determining the absence or presence of intent, the jury may consider the acts and conduct of the defendant and the general circumstances existing at the time of the alleged commission of the offense charged.” *State v. Braswell*, 225 N.C. App. 734, 740, 738 S.E.2d 229, 233 (2013) (internal quotation marks and citations omitted).

Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant’s guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant’s guilt may be drawn from the circumstances, then it is for the

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jury to decide whether the facts, *taken singly or in combination*, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

*Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455 (emphasis in original) (internal quotation marks and citations omitted).

Defendant argues that the trial court erred in denying his motion to dismiss for insufficient evidence because the State failed to present sufficient evidence, whether direct or circumstantial, from which a reasonable juror could infer that defendant intended to defraud Ms. Borland at the time he was paid. Defendant contends that the only reasonable inference from the evidence, even when viewed in a light most favorable to the State, is that defendant intended to perform the work in question and merely failed to follow through on this intention. Defendant points to evidence that he completed all work in the 15 October 2014 invoice other than the roof, skylight, and microwave. Defendant also notes evidence that he completed the work in all subsequent invoices to Ms. Borland's apparent satisfaction.

On prior occasion, this Court has affirmed a trial court's denial of a motion to dismiss for insufficient evidence when there was conflicting testimony from which the jury could infer an intent to defraud, where the defendant claimed that he failed to work because he was owed money on previous work. *See Octetree*, 173 N.C. App. 228, 617 S.E.2d 356. In *Octetree*, a witness testified that he had given the defendant \$100.00 to buy supplies for a job the defendant had agreed to perform, and the defendant failed to perform this job. *Id.* at 230, 617 S.E.2d at 358. The defendant

testified that he never received the money, and refused to perform the agreed upon task because the witness owed him money for previous work. *Id.* The defendant moved to dismiss due to insufficient evidence of his intent to defraud. *Id.* This Court held that the evidence “presented a question for the jury to resolve and [did] not mandate dismissal.” *Id.* (citation omitted).

Defendant argues that *Octetree* is distinguishable from the instant case because *Octetree* involved a single isolated work agreement, rather than one contract in an ongoing business relationship with a professional practice of invoicing, advance payment, and completion of invoiced work. In essence, defendant argues that it would be unreasonable to infer an intent to defraud from his incompleteness of the work on the roof, skylight, and microwave when considered in the context of defendant’s full performance of the work in all subsequent invoices.

Nevertheless, we have also found evidence of intent to defraud sufficient to withstand a motion to dismiss where the State presented evidence that the defendant made misrepresentations regarding the progress of the agreed upon work and failed to perform the work a substantial time after the agreed upon date of completion. *See State v. Lang*, 106 N.C. App. 695, 417 S.E.2d 808 (1992) (addressing intent to defraud in trial for obtaining property by false pretenses). In *Lang*, the State presented evidence that the defendant was under contract to build a boat for the victim, whereby the victim paid the defendant in installments at different stages of construction in

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order to finance the purchase of necessary materials. *Id.* at 697-99, 417 S.E.2d at 809-10. The defendant obtained an advance of \$6,500.00 from the victim, with the stated purpose of purchasing engines for the boat that would be delivered within ten days. *Id.* The defendant had not purchased the engines within ten days. *Id.* Six months later, the defendant told the victim that the engines had been purchased and delivered, but were in storage. *Id.* The defendant provided the victim with serial numbers for engines that he had reserved with the manufacturer but never purchased. *Id.* This Court held that “[f]rom these facts it [was] reasonable for the jury to infer that defendant never intended to purchase the engines[,]” and therefore the trial court’s denial of the defendant’s motion to dismiss was proper. *Id.* at 699, 417 S.E.2d at 810.

In the instant case, the State presented sufficient evidence from which a jury could infer defendant’s intent to defraud Ms. Borland. Viewing the evidence in the light most favorable to the State, the evidence shows that Ms. Borland paid defendant to replace her roof, microwave, and skylight per defendant’s invoice. Defendant provided Ms. Borland with a series of excuses as to why this work had not been completed for several months. Defendant finally told Ms. Borland that he had given the money to an unnamed roofing subcontractor who absconded with the funds. Defendant provided no further detail regarding this incident and did not explain why he paid the subcontractor the entire sum requested for the roof upfront. Ms. Borland

eventually hired another contractor to perform the agreed upon work. This contractor determined that the skylight did not require repairs.

As in *Lang*, defendant's misrepresentations and evasions as to why the work had not been completed provided the jury with sufficient circumstantial evidence to infer defendant's intent to defraud. While there was conflicting evidence from which it could be inferred that defendant merely failed to diligently complete the agreed upon work without fraudulent intent, resolution of this conflict was for the finder of fact. Viewing the evidence in a light most favorable to the State, there was sufficient evidence from which a jury could infer defendant's intent to defraud Ms. Borland at the time he obtained the \$7,549.00 requested for the unperformed work in the 15 October 2014 invoice. Therefore, the trial court did not err in denying defendant's motion to dismiss.

B. Jury Instructions

Next, defendant challenges the trial court's jury instructions for failing to work after being paid. Defendant contends that the jury instructions allowed the jury to convict on a theory not alleged in the indictment; specifically, allowing the jury to convict for failure to complete the agreed upon work when the indictment only charged that defendant failed to commence the work. Defendant did not object to the instructions below, and correctly concedes that our review on appeal is limited to plain error. *See State v. Tucker*, 317 N.C. 532, 539, 346 S.E.2d 417, 421 (1986)

(applying plain error review to challenge of erroneous jury instructions on appeal, where instructions were not objected to before jury retired). We hold that the jury instructions did not amount to plain error.

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) (alteration in original) (internal quotation marks and citations omitted).

“It is clearly the rule in this jurisdiction that the trial court should not give instructions which present to the jury possible theories of conviction which are . . . not charged in the bill of indictment.” *State v. Taylor*, 304 N.C. 249, 274, 283 S.E.2d 761, 777 (1981), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398, *reh’g denied*, 463 U.S. 1249, 77 L. Ed. 2d 1456 (1983). “[T]he failure of the allegations to conform to the equivalent material aspects of the jury charge represents a fatal variance, and renders the indictment insufficient to support that resulting conviction.” *State v. Williams*, 318 N.C. 624, 631, 350 S.E.2d 353, 357 (1986) (citations omitted).

“Nevertheless, this Court has stated that [a] jury instruction that is not specific to the [particular theory of conviction] in the indictment is acceptable so long as the

court finds no fatal variance between the indictment, the proof presented at trial, and the instructions to the jury.” *State v. Locklear*, \_\_ N.C. App. \_\_, \_\_, 816 S.E.2d 197, 204 (2018) (internal quotation marks omitted) (citing *State v. Ledwell*, 171 N.C. App. 314, 320, 614 S.E.2d 562, 566 (2005)) (discussing indictment for obtaining property by false pretenses).

Moreover, our Supreme Court has “found no plain error where the trial court’s instruction included the [theory of conviction] that was listed in the indictment and where compelling evidence had been presented to support an additional [theory or theories] not included in the indictment as to which the court had nevertheless instructed.” *State v. Tirado*, 358 N.C. 551, 575, 599 S.E.2d 515, 532 (2004) (citing *State v. Lucas*, 353 N.C. 568, 588, 548 S.E.2d 712, 726 (2001)), *cert. denied*, 544 U.S. 909, 161 L. Ed. 2d 285 (2005); *see also State v. Clinding*, 92 N.C. App. 555, 562, 374 S.E.2d 891, 895 (1989) (no plain error where “[e]ssentially the same evidence was required” to prove differing theories of conviction presented in indictment and erroneous jury instruction, and evidence of defendant’s guilt under either theory was “overwhelming”).

Defendant argues that instructing the jury on the theory of conviction alleged in the indictment as well as alternative theories not alleged in the indictment constitutes plain error. In support of his argument, defendant cites to several felony kidnapping cases in which plain error resulted from discrepancies between the jury

instructions and indictments regarding the method of kidnapping or the purpose for which the kidnapping was undertaken. *See, e.g., State v. Taylor*, 301 N.C. 164, 170-71, 270 S.E.2d 409, 413-14 (1980) (plain error where indictment alleged kidnapping by removing victim “for the purpose of facilitating the commission of the felony of rape and for the purpose of facilitating the flight of the defendant . . . following the commission of a felony[,]” but the jury was instructed on kidnapping by confinement or restraint of the victim for the purpose of facilitating flight of the defendant after commission of a felony or to obtain use of the victim’s car); *State v. Smith*, 162 N.C. App. 46, 51-52, 589 S.E.2d 739, 743 (2004) (plain error where indictment charged defendant with kidnapping by removal but jury was instructed on kidnapping by concealment, restraint, or removal); *State v. Turner*, 98 N.C. App. 442, 447-48, 391 S.E.2d 524, 527 (1990) (plain error where indictment charged defendant with conspiring with Ernie Lucas to deliver cocaine to Ernie Lucas, but jury was instructed on conspiracy between defendant and Ernie Lucas to deliver cocaine “to another”).

We find these cases to be distinguishable. A person is guilty of first-degree kidnapping if they “unlawfully [and without consent] confine, restrain, or remove [a person] from one place to another” for one of six enumerated purposes. N.C. Gen. Stat. § 14-39 (2017). In *State v. Tucker*, our Supreme Court held that the trial court plainly erred in instructing the jury that the defendant could be convicted if he unlawfully restrained the victim, whereas the indictment charged the defendant with



kidnapping by unlawful removal of the victim to another location. 317 N.C. at 537-40, 346 S.E.2d at 420-22. The Court so held because “[i]n light of the highly conflicting evidence . . . on the unlawful removal and restraint issues, . . . the instructional error might have . . . tilted the scales and caused the jury to reach its verdict convicting the defendant.” *Id.* at 540, 346 S.E.2d at 422 (internal quotation marks omitted).

In *State v. Gainey*, the indictment charged the defendant with kidnapping by confinement of the victim. 355 N.C. 73, 94, 558 S.E.2d 463, 477, *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002). The trial court erroneously instructed the jury that the defendant could be convicted if he restrained the victim or removed the victim to another location. *Id.* Our Supreme Court held that this instruction did not constitute plain error, because

[t]he evidence show[ed] that defendant confined, restrained and removed the victim . . . . Given the strength of the evidence against defendant, including his own admissions, *there is no reasonable basis for us to conclude that any different combination of the terms “confine,” “restrain” or “remove” in the instruction would have altered the result.* We cannot conclude that had the trial court instructed the jury that the defendant had to “confine” the victim to be guilty of first-degree kidnapping, this would have tilted the scales in favor of defendant.

*Id.* at 95, 558 S.E.2d at 478 (emphasis added).

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In the instant case, defendant was indicted for failing to work after being paid, on the theory that he failed to commence work on the roof, microwave, and skylight. The trial court instructed the jury as follows:

So I charge you that if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant, with the intent to cheat or defraud, obtained an advance by promising or agreeing to begin work or labor for the victim, and that the defendant without a lawful excuse failed to *commence or complete* the work that he had promised, it would be your duty to return a verdict of guilty.

(emphasis added).

Defendant argues that the trial court's instruction that the jury could convict him for failing to complete the work was prejudicial error, because the evidence at trial did not support the theory that he failed to commence the work. Defendant maintains that the instruction allowed the jury to convict him on an alternative theory not charged in the indictment and more supported by the evidence, causing a different verdict than would have resulted but for the erroneous instruction. We disagree.

The instant case is comparable to *Gainey* and distinguishable from *Tucker*. Unlike *Tucker*, the evidence here is not "highly conflicting" with the theories that defendant failed to either commence or complete the agreed upon work. Rather, as in *Gainey*, the State presented evidence entirely consistent with both theories. Ms. Borland testified that defendant never performed any work on the microwave, roof,

or skylight after he invoiced her for these items and cashed her check on 15 October 2014. Ms. Borland further testified that she had to hire another contractor to complete these items. Work that has not commenced is obviously incomplete. Therefore, there is no reasonable basis for us to conclude that the jury would have reached a different verdict had the trial court correctly instructed the jury that defendant must fail to “commence” the work rather than fail to “commence or complete” the work in order to be found guilty. Though erroneous, the trial court’s instruction did not rise to the level of plain error.

C. Restitution

Finally, defendant contends the trial court erred by requiring him to pay \$7,549.00 in restitution to Ms. Borland. Defendant argues that the order of restitution must be vacated because the trial court failed to consider his ability to pay restitution. We disagree.

“In determining the amount of restitution to be made, the court shall take into consideration the resources of the defendant . . . , the defendant’s ability to earn, the defendant’s obligation to support dependents, and any other matters that pertain to the defendant’s ability to make restitution, but the court is not required to make findings of fact or conclusions of law on these matters.” N.C. Gen. Stat. § 15A-1340.36(a) (2017). “Whether the trial court properly considered a defendant’s ability

to pay when awarding restitution is reviewed by this Court for abuse of discretion.”

*State v. Hillard*, \_\_ N.C. App. \_\_, \_\_, 811 S.E.2d 702, 705 (2018) (citation omitted).

Although the trial court is required to consider the defendant’s ability to pay when ordering restitution, the defendant bears the burden of putting forth evidence demonstrating his inability to pay restitution when there is some evidence before the court indicating an ability to pay. *State v. Tate*, 187 N.C. App. 593, 596-97, 653 S.E.2d 892, 895 (2007); *State v. Riley*, 167 N.C. App. 346, 349, 605 S.E.2d 212, 215 (2004). Restitution orders will be overturned only when the trial court “[does] not consider *any* evidence of defendant’s financial condition[.]” *Tate*, 187 N.C. App. at 598, 653 S.E.2d at 896 (emphasis in original) (citing *State v. Smith*, 90 N.C. App. 161, 168, 368 S.E.2d 33, 38 (1988), *aff’d*, 323 N.C. 703, 374 S.E.2d 866, *cert. denied*, 490 U.S. 1100, 104 L. Ed. 2d 1007 (1989)), or when “common sense dictates” that the evidence before the court clearly shows the defendant’s inability to pay. *Tate*, 187 N.C. App. at 599, 653 S.E.2d at 896; *State v. Hayes*, 113 N.C. App. 172, 175, 437 S.E.2d 717, 719 (1993).

The cases that defendant cites in support of his argument are distinguishable from the case at hand. In *State v. Smith*, the trial court ordered the defendant to pay \$500,000.00 in restitution and failed to consider any evidence of ability to pay, as evidenced by the court’s statement that it was unaware whether the defendant had a job. 90 N.C. App. at 168-69, 368 S.E.2d at 38. In *State v. Mucci*, the trial court imposed substantial community service requirements and a significant amount of

restitution as a condition of the defendant's probation. 163 N.C. App. 615, 627, 594 S.E.2d 411, 419-20 (2004). This Court noted that the substantial twenty-five hours of community service the defendant was required to perform each week would clearly impede his ability to work enough to pay \$10,000.00 per year in restitution. *Id.*

In the instant case, the trial court was not oblivious to defendant's employment status, nor did it impose other requirements that would impede defendant's ability to pay restitution. The trial court had evidence before it indicating defendant's ability to pay. The evidence at trial indicated that defendant was employed as a contractor and Ms. Borland had paid him approximately \$42,984.63 for remodeling work on her home. Defendant put forth no evidence at trial tending to show that he was unable to pay restitution. Therefore, because the trial court was not wholly unaware of defendant's ability to pay and common sense does not dictate that the evidence before it clearly indicated an inability to pay restitution, the trial court did not abuse its discretion in ordering defendant to pay \$7,549.00 in restitution.

### III. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judges ZACHARY and HAMPSON concur.

Report per Rule 30(e).