IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1186

Filed: 15 October 2019

Rowan County, Nos. 17 CRS 053511, 17 CRS 003109

STATE OF NORTH CAROLINA

v.

ERIC LAMONT GRAHAM, Defendant.

Appeal by Defendant from judgment entered 13 June 2018 by Judge Lori I. Hamilton in Rowan County Superior Court. Heard in the Court of Appeals 10 April 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Laura H. McHenry, for the State.

Linda B. Weisel for defendant-appellant.

MURPHY, Judge.

BACKGROUND

On the evening of 15 July 2017, Tony Brawley ("Brawley") was at his home when Defendant, Eric Lamont Graham, arrived at approximately 10:00 P.M. with a female friend. Brawley grew up with Defendant's family and had known Defendant since Defendant was a child. Brawley had not invited Defendant to his home, but

nevertheless invited Defendant and his friend in for a drink. While Brawley and Defendant were having a couple of drinks, Defendant asked Brawley if his friend, who had come with a suitcase, could use Brawley's shower. Brawley agreed, and he and Defendant continued to talk.

Defendant told Brawley that the two were running out of gas in the friend's car and asked if Brawley could give them gas money. Brawley responded, "Well, I don't have any cash on me, but I'll let you go to the Credit Union and . . . get some money out." He instructed Defendant to go the ATM "on Highway 150, Mooresville Highway." He further told Defendant to "take a hundred dollars out[,] . . . get himself $20[.00] worth of gas, and . . . go to the store and get some more beer and get [Brawley] some cigarettes . . . ." Brawley instructed Defendant to return and bring back the what remained of the one hundred dollars. Defendant and his friend left Brawley's home shortly after midnight and did not return.

Later that morning, Brawley called Defendant's brother who was also related by marriage to Brawley. Brawley told him that Defendant never returned with the debit card and asked the brother if he could find out Defendant's location. After receiving no further information from Defendant's brother, Brawley went to his bank, the State Employee's Credit Union ("SECU"), first thing Monday morning. He learned that his account had been emptied. Brawley received a printout of his

account's recent transactions showing the withdrawals and then went to the Sheriff's Department to file a report.

Detective Tracy Allen ("Detective Allen") was assigned to the case, and, after receiving the report of Brawley's bank transactions, contacted SECU to obtain footage from the ATMs from which the money was withdrawn. Among other withdrawals, Detective Allen received footage from two withdrawals in particular: a $100.00 withdrawal at 7:11 A.M. on 16 July 2017 and a $40.00 withdrawal at 10:41 A.M. on 16 July 2017. Detective Allen was later able to identify the individual depicted in the ATM footage withdrawing the money at these times as Defendant.

In the meantime, on Monday, 17 July 2017, Defendant's mother visited Brawley and informed him that Defendant had been stabbed and was hospitalized as a result; however, she was unaware of when he was admitted to or discharged from the hospital. Brawley later encountered Defendant, and Defendant told Brawley that "he was coming back, but . . . that this fight or whatever happened." Brawley was still unsure of when the physical altercation happened.

Defendant was indicted on two counts of obtaining property by false pretenses and one count of attaining habitual felon status.[1] After a trial on the two counts of obtaining property by false pretenses, a jury found Defendant not guilty on the count

[1] The amount alleged in the indictments for both counts of obtaining property by false pretenses was originally $100.00. However, the trial court later allowed the State to amend the amount in the second indictment (17 CRS 53511) to $40.00.

stemming from the $100.00 withdrawal but guilty of the count stemming from the $40.00 withdrawal. After a subsequent trial, a jury convicted Defendant of attaining habitual felon status. The trial court sentenced Defendant to an active sentence in the presumptive range of 111 to 146 months. The trial court also imposed a fine of $250.00 and ordered restitution in the amount of $447.40. Defendant gave oral notice of appeal.

ANALYSIS

A. Motion to Dismiss

Defendant argues the trial court erred in denying his motion to dismiss the obtaining property by false pretenses charge upon which he was ultimately convicted.[2] Specifically, he contends there was insufficient evidence that he was the perpetrator of the offense and that he "acted with intent to cheat and made an intentionally deceptive representation." We disagree.

We review the trial court's denial of a defendant's motion to dismiss de novo. *State v. Gray*, 820 S.E.2d 364, 367 (N.C. Ct. App. 2018), *disc. rev. denied*, 824 S.E.2d 419 (N.C. 2019).

> 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

[2] Again, the jury acquitted Defendant on the count of obtaining property by false pretenses arising out of the $100.00 withdrawal (17 CRS 053509). Therefore, we only address the trial court's denial of Defendant's motion to dismiss on the charge upon which Defendant was convicted – obtaining property by false pretenses arising out of the $40.00 withdrawal (17 CRS 53511).

> offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Id. (internal citations and quotation marks omitted). "All evidence, competent or incompetent, must be considered." *State v. Bradshaw*, 366 N.C. 90, 93, 728 S.E.2d 345, 347 (2012).

Furthermore, our Supreme Court has stated:

> In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. 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 jury to decide whether the facts, taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty.

State v. Fritsch, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455 (2000) (internal citations and quotation marks omitted).

We first address Defendant's argument that the State presented insufficient evidence that Defendant was the perpetrator of the charged offense. Brawley

testified that Defendant was the individual to whom he gave his debit card for the limited purpose of withdrawing $100.00 from the ATM. Additionally, Detective Allen testified that he reviewed photographs taken from the ATM where the $40.00 was withdrawn at the time of withdrawal and was able to identify Defendant as the individual in the photographs. The State introduced into evidence a photograph from the ATM where the $40.00 was withdrawn at 10:41 A.M. depicting the individual Detective Allen identified as Defendant using the ATM machine.[3] This evidence is sufficient such that a reasonable mind might accept it as adequate to support the conclusion that Defendant was the perpetrator of the charged offense.

We now turn to Defendant's contention that the State presented insufficient evidence that he "acted with intent to defraud, made any representation with intent to deceive, and made a deceptive representation." To prove the offense of obtaining property by false pretenses under N.C.G.S. § 14-100, the State must establish the following elements: "(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another." *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980) (internal citations omitted); N.C.G.S. § 14-100 (2017).

[3] Discussed below, Defendant challenges the admissibility of this evidence on appeal. However, in reviewing a trial court's denial of a motion to dismiss, we consider all evidence regardless of whether it is competent or not. *Bradshaw*, 366 N.C. at 93, 728 S.E.2d at 347.

Our Supreme Court has held that "[a]n essential element of the offense is that the defendant acted knowingly with the intent to cheat or defraud. Moreover, the false pretense need not come through spoken words, but instead may be by act or conduct." *State v. Parker*, 354 N.C. 268, 284, 553 S.E.2d 885, 894 (2001) (internal citations omitted). Evidence of a defendant's intent is "seldom provable by direct evidence. It must ordinarily be prove[n] by circumstances from which it may be inferred. In determining the presence or absence of the element 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. Hines*, 54 N.C. App. 529, 533, 284 S.E.2d 164, 167 (1981) (internal citations, alterations, and quotation marks omitted).

The State presented evidence establishing that Brawley gave Defendant his debit card shortly after midnight on 16 July 2017 with permission to withdraw exactly $100.00 from his account at SECU. Defendant, after removing the amount of $100.00 from an ATM, proceeded to use the debit card at a second ATM and removed $40.00 in excess of the amount he was given permission to withdraw. Defendant contends that "[i]f [he] subsequently used the card a few hours later to withdraw $40 more, all the evidence shows he had [ ] Brawley's implicit authorization to do so." To the contrary, the evidence, taken in the light most favorable to the State, established that Defendant had been told by Brawley and was aware that he only had

authorization to withdraw $100.00. In turn, this evidence establishes that he was without permission to withdraw the excess $40.00. Given this conduct, a reasonable juror might accept this evidence as adequate to support the conclusion that Defendant knowingly made a false representation to SECU with the intent to cheat or defraud.

For these reasons, the trial court did not err in denying Defendant's motion to dismiss.

B. Authentication of Evidence

Defendant argues the trial court erred in admitting State's Exhibit 2, a photograph from the surveillance camera on the ATM taken at the time of the $40.00 withdrawal that allegedly depicted Defendant using the machine. Specifically, Defendant contends the State failed to "describe or identify a system used to produce photographic images." We disagree.

At trial, the State called as a witness Meredith Eller ("Eller"), a financial services officer at SECU. Eller testified that when SECU employees are given a card number, they can "find the transactions that are in question" and identify the ATM location where the transaction took place. She further testified that when the ATM location is obtained, she "submit[s] an online request to [the SECU] security department to pull the photos that correspond with that location and that card and that timestamp." She also stated that the date and time are automatically recorded

when the transaction takes place. Eller testified that all surveillance footage from ATM machines are stored in the "main office in Raleigh" and that she was unaware of the "storage method there[,]" but that the date and time are automatically recorded in the system when the transaction occurs. The footage is then returned to the requester via email who may then distribute it to law enforcement.

Based on Eller's testimony, the State sought to introduce Exhibit 2. Eller testified that this photograph was "the same one[] that [she] was e-mailed" by the SECU security department, that it had not been altered in any way, and that it corresponded to the relevant date and time. Defendant did not object to the exhibit's admission, and we therefore review its admission for plain error.[4]

We "apply the plain error standard of review to unpreserved . . . evidentiary errors in criminal cases." *State v. Maddux*, 371 N.C. 558, 564, 819 S.E.2d 367, 371 (2018).

> 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 affects the fairness, integrity or public reputation of

[4] Defendant curiously argues that he made a "timely objection" to the admission of this evidence. He bases this argument on the trial court stating "in anticipation of your objection . . . ." However, the record does not indicate that Defendant ever raised an objection. Indeed, when the State sought to introduce Exhibit 2, the trial court asked if Defendant wished to be heard and received "[n]o verbal response."

> judicial proceedings.

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

Rule 901 of the North Carolina Rules of Evidence provides:

> The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

N.C.G.S. § 8C-1, Rule 901(a) (2017). Rule 901 then lists ten examples of authentication or identification that conform with this rule. N.C.G.S. § 8C-1, Rule 901(b) (2017). One such example is "[p]rocess or [s]ystem." N.C.G.S. § 8C-1, Rule 901(b)(9) (2017). In *State v. Snead*, 368 N.C. 811, 783 S.E.2d 733 (2016), our Supreme Court reiterated that "[r]ecordings such as a tape from an automatic surveillance camera can be authenticated as the accurate product of an automated process under Rule 901(b)(9)." *Id.* at 814, 783 S.E.2d at 736 (citation and internal quotation marks omitted). Our Supreme Court held that "[e]vidence that the recording process is reliable and that the video introduced at trial is the same video that was produced by the recording process is sufficient to authenticate the video and lay a proper foundation for its admission as substantive evidence." *Id.*

In *State v. Howard*, 215 N.C. App. 318, 715 S.E.2d 573 (2011), the defendant similarly claimed that the trial court committed plain error by admitting "Wal-Mart receipts and photos captured from the Wal-Mart surveillance video" when the

evidence was not properly authenticated. *Id.* at 327, 715 S.E.2d at 579. We stated, "it appears that if [the] defendant had made a timely objection, the State could have supplied the necessary foundation." *Id.* We held that "[s]ince [the] defendant has made no showing that the foundational prerequisites, upon objection, could not have been supplied and has pointed to nothing suggesting that the evidence in question is inaccurate or otherwise flawed, we decline to conclude the omissions . . . amount to plain error." *Id.* at 327, 715 S.E.2d at 579-80.

Assuming *arguendo* that Exhibit 2 was not properly authenticated under Rule 901 and was therefore erroneously admitted into evidence, Defendant fails to show this error is plain error. Had Defendant objected to the admission of this evidence, the State would have had the opportunity to lay additional foundation to authenticate Exhibit 2. Similar to the defendant in *Howard*, Defendant makes no argument that the State could not have supplied further foundation regarding the system under which the ATM footage was stored for authentication had he lodged a timely objection. Additionally, the State presented evidence that Defendant was given Brawley's debit card before the withdrawal was made, and Detective Allen had already testified without objection that when he reviewed the ATM footage from the time of the withdrawal, he was able to identify Defendant as the individual depicted. For these reasons, Defendant fails to show that the trial court plainly erred by admitting Exhibit 2.

C. Jury Instruction on Lesser-Included Offense

Defendant contends the trial court committed plain error by failing to instruct the jury on the charge of financial transaction card fraud under N.C.G.S. § 14-113.13, which he argues is a lesser included offense of obtaining property by false pretenses. We disagree.

Given that Defendant failed to object to the absence of an instruction on financial transaction card fraud, we review for plain error. Again, to show plain error, 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." *Lawrence*, 365 N.C. at 518, 723 at 334 (internal citations and quotation marks omitted). We reiterate that "because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (internal citation, alterations, and quotation marks omitted).

We employ "a definitional test for determining whether one crime is a lesser included offense of another crime." *State v. Nickerson*, 365 N.C. 279, 281, 715 S.E.2d 845, 846 (2011). That is, "the test is whether the essential elements of the lesser crime are essential elements of the greater crime. If the lesser crime contains an essential element that is not an essential element of the greater crime, then the lesser

crime is not a lesser included offense." *Id.* at 282, 715 S.E.2d at 847. Because this test is definitional, our Supreme Court has expressly rejected the argument that this determination may be made under a specific factual scenario. *State v. Robinson*, 368 N.C. 402, 407, 777 S.E.2d 755, 758 (2015) (quoting *State v. Weaver*, 306 N.C. 629, 295 S.E.2d 375 (1982), *overruled in part on other grounds by State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993)).

The elements of obtaining property by false pretenses are: "(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another." *Cronin*, 299 N.C. at 242, 262 S.E.2d at 286; N.C.G.S. § 14-100 (2017).

N.C.G.S. § 14-113.13 defines the offense of financial transaction card fraud and provides in relevant part:

> (a) A person is guilty of financial transaction card fraud when, with intent to defraud the issuer, a person or organization providing money, goods, services or anything else of value, or any other person, he
>
> . . .
>
> (2) Obtains money, goods, services, or anything else of value by:
>
> a. Representing without the consent of the cardholder that he is the holder of a specific card; or
>
> b. Presenting the financial transaction card without the

> authorization or permission of the cardholder; . . .

N.C.G.S. § 14-113.13 (a)(2)(a)-(b) (2017). Defendant's argument only addresses subsections (a)(2)(a) and (a)(2)(b), which he calls "financial transaction card fraud by representation" and "financial transaction card fraud by presentation"; therefore we do not address subsections (a)(2)(c) or (a)(2)(d). To establish this offense based on subsections (a)(2)(a) or (a)(2)(b), the State must prove that the defendant (1) with the intent to defraud; (2) obtains money, goods, services, or anything else of value; (3) by either representing without the consent of the cardholder that he is the holder of a specific card *or* presenting the financial transaction card without the authorization or permission of the cardholder. *Id.*

Defendant does not argue that all of the elements of financial transaction card fraud are definitionally covered by obtaining property by false pretenses; rather, he argues that "the act of using a debit card without permission at a Credit Union ATM can be both a false pretense under [N.C.G.S.] § 14-100 and representing or presenting under [N.C.G.S.] § 14-113.13(a)[(2)(a)-(b)]. As the State tried this case on the theory [Defendant] 'actually obtained' money, all the elements of financial card fraud were contained within the offense of obtaining property by false pretense." The flaw in Defendant's argument is that it is grounded in the factual circumstances of this case and not the elements of the two crimes definitionally. *See Robinson*, 368 N.C. at 407, 777 S.E.2d at 758.

Nevertheless, we conclude that the financial transaction card fraud by subsections (a)(2)(a) and (b) are not definitionally lesser-included offenses of obtaining property by false pretenses. Financial transaction card fraud, as its name suggests, requires the State to prove the use of a financial card and various aspects of the consent, authorization, or permission of the cardholder that are not essential elements of obtaining property by false pretenses. *See State v. Freeman*, 308 N.C. 502, 514, 302 S.E.2d 779, 786 (1983) (holding that "the crime of uttering worthless checks is not a lesser included offense of obtaining property under false pretenses), *overruled in part on other grounds State v. Rogers*, 346 N.C. 262, 485 S.E.2d 619 (1997). The trial court did not plainly err by failing to instruct the jury on this charge.

D. Criminal Fine

Defendant next argues the trial court's imposition of a $250.00 fine was improper as it was (1) an excessive fine in violation of the United States and North Carolina Constitutions and (2) imposed without proper consideration of his ability to pay the fine.

We first address Defendant's constitutional argument that the fine violated the prohibition on excessive fines under the Eighth Amendment to the United States Constitution and Article I, Section 27 of the North Carolina Constitution. Our Supreme Court "has consistently held that constitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal. This is true

even when a sentencing issue is intertwined with a constitutional issue." *State v. Meadows*, 371 N.C. 742, 749, 821 S.E.2d 402, 407 (2018) (internal citations and quotation marks omitted). Defendant failed to argue to the sentencing court that the fine imposed violates the United States and North Carolina Constitutions. This argument is waived. *See id.*

Defendant's second argument that the trial court erred in imposing the fine without considering his ability to pay is statutory and is therefore preserved despite his failure to lodge a contemporaneous objection to the trial court. *Id.* N.C.G.S. § 15A-1340.17 provides that "[a]ny judgment that includes a sentence of imprisonment may also include a fine. . . . Unless otherwise provided, the amount of the fine is in the discretion of the court." N.C.G.S. § 15A-1340.17(b) (2017).[5] Defendant argues that N.C.G.S. § 15A-1362 "requires the trial court to consider the 'burden that payment will impose in view of the financial resources of the defendant.'" (Citing N.C.G.S. § 15A-1362(a) (2017)). Defendant's argument that the trial court erred by failing to consider his ability to pay was similar to the one the defendant made in *State v. Zubiena*, 251 N.C. App. 477, 796 S.E.2d 40 (2016). There, we held:

> We are also unpersuaded by [the d]efendant's argument that the trial court erred by failing to consider her resources when it imposed the fine. The statute Defendant cites for this proposition, [N.C.G.S.] § 15A–1362, states that "[i]n determining the method of payment of a fine, the

[5] No statutory provision addresses the fine that may be imposed for a conviction of obtaining property by false pretenses. Accordingly, the trial court could exercise its discretion in determining the amount of the fine.

> court should consider the burden that payment will impose in view of the financial resources of the defendant." As its plain language indicates, this statute relates to the method of payment of the fine rather than its amount.

Id. at 489, 796 S.E.2d at 49 (internal citations omitted). For the same reasons, we are similarly unpersuaded by Defendant's argument that the trial court erred in failing to consider his ability to pay the fine imposed. This argument is overruled.

E. Restitution

Defendant's final argument is that the trial court's order for restitution is unsupported by evidence and must be vacated. We agree.

"The amount of restitution ordered by the trial court must be supported by competent evidence presented at trial or sentencing." *State v. Watkins*, 218 N.C. App. 94, 107-08, 720 S.E.2d 844, 853 (2012) (citation and internal quotation marks omitted). "In the absence of an agreement or stipulation between [the] defendant and the State, evidence must be presented in support of an award of restitution." *Id.* at 108, 720 S.E.2d at 853 (citation and internal quotation marks omitted). "Furthermore, this Court has held that the unsworn statements of the prosecutor do not constitute evidence and cannot support the amount of restitution recommended." *State v. Replogle*, 181 N.C. App. 579, 584, 640 S.E.2d 757, 761 (2007) (citation, internal quotation marks, and alterations omitted).

The trial court ordered that Defendant pay restitution in the amount of $447.40. In support of this amount, the prosecutor in this case made the following

unsworn assertion: "The amount that the Credit Union reimbursed Mr. Brawly was $447.40. I would ask that as restitution as part of a civil judgment." On appeal, the State concedes that this was "the only evidence of the total amount of pecuniary loss to the victim . . . ." Our caselaw makes clear that such evidence alone cannot support the restitution order. *See Replogle*, 181 N.C. App. at 584, 640 S.E.2d at 761. Accordingly, the restitution portion of the judgment is vacated and remanded for a new hearing on restitution. *See State v. Sullivan*, 216 N.C. App. 495, 506, 717 S.E.2d 581, 588 (2011).

CONCLUSION

The State presented substantial evidence of each essential element of obtaining property by false pretenses and of Defendant's being the perpetrator of that offense sufficient to overcome Defendant's motion to dismiss. Assuming *arguendo* the State failed to properly authenticate Exhibit 2, Defendant has failed to show plain error in its admission. Defendant has also failed to show plain error in the trial court's failure to instruct the jury on financial transaction card fraud. Defendant's constitutional argument regarding the fine the trial court imposed is unpreserved and thus waived, and his statutory argument that the trial court failed to properly consider his ability to pay the fine is unavailing. Lastly, the trial court's order for restitution is unsupported by evidence and must be vacated and remanded for a new

hearing on restitution. Accordingly, we find no error in part and vacate and remand in part solely for a new hearing on restitution.

NO ERROR IN PART; NO PLAIN ERROR IN PART; VACATED AND REMANDED IN PART.

Judges DILLON and HAMPSON concur.

Report per Rule 30(e).