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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-477

Filed: 5 May 2020

Bladen County, No. 16 CRS 050689

STATE OF NORTH CAROLINA

v.

ANTHONY R. HOLT

Appeal by Defendant from Judgment entered 10 October 2018 by Judge Beecher R. Gray in Bladen County Superior Court. Heard in the Court of Appeals 22 January 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Rory Agan, for the State.*

*Guy J. Loranger for defendant-appellant.*

HAMPSON, Judge.

**Factual and Procedural Background**

Anthony R. Holt (Defendant) appeals from convictions for Obtaining Property by False Pretenses and attaining Habitual-Felon status. The Record before us, including evidence presented at trial, tends to show the following:

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On 11 July 2016, a Bladen County grand jury indicted Defendant on charges of Financial Card Fraud and Obtaining Property by False Pretenses.<sup>1</sup> The Indictment alleged Defendant committed Obtaining Property by False Pretenses on 3 March 2016<sup>2</sup> by

knowingly and designedly with the intent to cheat and defraud, obtain or attempt to obtain from Branch Bank and Trust Bank ATM, located at 215 West Broad Street, Elizabethtown, NC by means of a false pretense which was calculated to deceive and did deceive. The false pretense consisted of the following: using a debit card belonging to his mother, Geneva Hickman [(Hickman)], to obtain cash when he was not the owner of the card.

On 5 June 2017, the grand jury returned an additional Indictment charging Defendant with attaining Habitual-Felon status. The matter came on for trial on 9 October 2018.

Prior to the start of trial, Defendant's counsel (Defense Counsel) moved for a continuance, informing the trial court Defendant had raised "some evidence he previously didn't tell me about, some camera footage that would show him and his mother using the card on the day in question." Defendant claimed he had written Defense Counsel letters for thirty-one months "letting her know that I needed [the video footage]." Defense Counsel, however, claimed Defendant had just informed her of the purported video footage that day. After a discussion with Defendant, Defense

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<sup>1</sup> At the close of all the evidence during Defendant's trial, the State voluntarily dismissed the charge of Financial Card Fraud.

<sup>2</sup> The Indictment originally alleged the offense occurred on 5 March 2016. Defendant did not object to the trial court allowing the State to amend the date to 3 March 2016.

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Counsel, and the State, the trial court indicated Defendant could take the plea offer by the State or “we’re going to try the case.” Defendant did not accept the plea and asked whether he would be able to present the camera footage, to which the trial court replied, “Your attorney will take care of that matter.”

Trial began and the State called three witnesses. The first witness, Lindsay Cooke (Cooke), the Manager of Security Services for Truliant Federal Credit Union (Truliant), testified on 18 March 2016, Hickman went to Truliant’s Mebane branch and completed a Member Fraud Form, reporting fraudulent use of her debit card. The Member Fraud Form, which was admitted into evidence, indicated Hickman discovered seventeen “unauthorized transactions” on her debit card on 17 March 2016. Pertinent to this appeal, the form listed two transactions of \$203.00 each, which occurred in Elizabethtown on 3 March 2016, and two additional withdrawals of \$203.00 that occurred at a Scotchman convenience store in White Lake on 5 March 2016. On the form, Hickman indicated she did not give anyone permission to use her debit card and her card was “stolen.” Cooke testified Truliant investigated the allegedly fraudulent charges, determined Hickman did not make the charges, and turned over its investigation to the Burlington Police Department.

The State then called Officer Alexandria Davis of the Burlington Police Department (Officer Davis) as a “404(b)<sup>3</sup> witness” to testify about the transactions in

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<sup>3</sup> See N.C. Gen. Stat. § 8C-1, Rule 404(b) (2019) (evidence of other crimes, wrongs or acts not admissible to show character or acts in conformity therewith but may be admitted for other purposes).

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Burlington. Defendant objected, and the trial court overruled Defendant's objection, allowing Officer Davis's testimony to show "a common scheme or plan, lack of accident[.]" Officer Davis testified Hickman came into the Burlington Police Department in March 2016 to report the fraudulent charges on her debit card and told Officer Davis "[Defendant] had taken her debit card while they were at White Lake and that he had made multiple charges."

Officer Davis's subsequent investigation included obtaining photographs from other allegedly fraudulent transactions made in Burlington using the debit card. Officer Davis presented Hickman with these photographs, and she identified Defendant "[r]ight off the bat" as the person who made the transactions. As a result, Officer Davis charged Defendant with obtaining property by false pretenses in Alamance County, and Officer Davis testified Defendant was convicted of this charge. Officer Davis also testified she contacted Deputy Jeffrey Guyton of the Bladen County Sheriff's Department (Deputy Guyton) and notified him of her investigation.

The State called Deputy Guyton as its final witness. Deputy Guyton testified Hickman came in person to see him and reported the alleged fraudulent transactions at issue in the present case. Deputy Guyton testified he obtained photographs from the 3 March 2016 transactions in Elizabethtown and identified Defendant as the suspect. Over Defendant's objection, these photographs were admitted into evidence.

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After the close of the State's evidence, Defendant moved to dismiss the charge of Obtaining Property by False Pretenses, which the trial court denied. Thereafter, Defendant called Hickman to testify. Hickman testified she went with Defendant and another individual to White Lake in March 2016. While there, Defendant asked Hickman for her debit card. Hickman explained to Defendant her debit card was cancelled and did not work; however, Hickman still gave Defendant her debit card. On 3 March 2016, Defendant called Hickman and asked for her PIN, which Hickman provided because she believed it was canceled. Later that evening, Defendant returned the debit card to Hickman, and Hickman stated, "I told you it didn't work." Hickman further testified Defendant did not inform her that he had used her debit card, she did not intend for Defendant to withdraw money from her account, and Defendant obtained the money from her account without her permission.

Prior to the jury charge, the State requested the trial court instruct the jury on the doctrine of recent possession, and Defendant did not object. The trial court instructed the jury:

The State seeks to establish [D]efendant's guilt by the doctrine of recent possession. For this doctrine to apply, the State must prove three things beyond a reasonable doubt:

First, that property was stolen.

Second, that [D]efendant had possession of this property. A person possesses property when that person is aware of its presence, and has, either alone or with others, both the power and intent to control its disposition or use.

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On 10 October 2018, the jury returned verdicts finding Defendant guilty of Obtaining Property by False Pretenses and attaining Habitual-Felon status. The same day, the trial court entered its Judgment sentencing Defendant to 120–156 months’ imprisonment. Defendant gave Notice of Appeal in open court.

**Issues**

The dispositive issues are (I) whether the trial court plainly erred by instructing the jury on the doctrine of recent possession and (II) whether the Record is sufficient to review Defendant’s ineffective assistance of counsel (IAC) claim on direct review.

**Analysis**

**I. Jury Instruction**

*A. Standard of Review*

Defendant did not object to the trial court’s instruction on the doctrine of recent possession. When a defendant in a criminal trial does not object in the trial court to the trial court’s decision to give a particular jury instruction, on appeal, we review the trial court’s decision for plain error. *See State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012) (“Unpreserved error in criminal cases . . . is reviewed only for plain error.” (citations omitted)).

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 judicial proceedings[.]

*Id.* at 518, 723 S.E.2d at 334 (alteration, citations, and quotation marks omitted).

*B. Recent Possession*

Defendant was convicted of Obtaining Property by False Pretenses under N.C. Gen. Stat. § 14-100. For a defendant to be convicted of this offense, the State must establish the defendant made: “(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) (citations omitted); *see also* N.C. Gen. Stat. § 14-100(a) (2019).

“An 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, 897 (2001) (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.” *State v. Hines*, 54 N.C. App. 529, 533, 284 S.E.2d 164, 167 (1981) (citation and quotation marks omitted). “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[.]” *Id.* (alteration, citation, and quotation marks omitted).

Here, as part of its jury instruction on Obtaining Property by False Pretenses, the trial court, at the State’s request, instructed the jury on the doctrine of recent possession. “The doctrine [of recent possession] is a rule of law which allows the jury to presume that the possessor of stolen property is guilty of larceny.” *State v. Callahan*, 83 N.C. App. 323, 325, 350 S.E.2d 128, 130 (1986) (citation omitted). “The State’s evidence must establish the following facts in order to invoke the doctrine of recent possession: (1) the goods were stolen; (2) the goods were in [the] defendant’s custody and control to the exclusion of others; and (3) [the] defendant possessed the property recently after the larceny.” *State v. Washington*, 86 N.C. App. 235, 249, 357 S.E.2d 419, 429 (1987) (citation omitted).

Defendant contends this doctrine is inapplicable in the present case and the trial court’s submission of this jury instruction “allowed the jury to infer that the transactions [Defendant] made on [3 March 2016] were unauthorized, and thus fraudulent, if the jury found that he merely possessed the ‘stolen’ card on that date.” However, even assuming *arguendo* giving the instruction was erroneous,<sup>4</sup> Defendant

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<sup>4</sup> The trial court’s instruction tracks the first portion of the North Carolina Pattern Jury Instruction for the doctrine of recent possession; however, the trial court left out the following from its instruction:



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must show such prejudice resulting from the error it rises to plain error. *See, e.g., State v. Laws*, 345 N.C. 585, 599-600, 481 S.E.2d 641, 648-49 (1997) (holding, without analysis of alleged error in jury instruction, that assuming *arguendo* the jury instruction was error, it was not plain error); *State v. Davis*, 230 N.C. App. 50, 55-56, 748 S.E.2d 189, 193 (2013) (same).

Defendant, however, cannot show prejudice because the trial court's jury instruction on Obtaining Property by False Pretenses was otherwise correct and the State presented sufficient evidence showing Defendant acted with the requisite fraudulent intent in obtaining property by false pretense. Specifically, the State presented sufficient evidence of Defendant's fraudulent intent for the jury to find Defendant knew he was not entitled to use Hickman's debit card, thereby constituting the false representation to Truliant. *See Cronin*, 299 N.C. at 242, 262 S.E.2d at 286

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And Third, that the defendant had possession of this property so soon after it was stolen and under such circumstances as to make it unlikely that the defendant obtained possession honestly.

If you find these things from the evidence beyond a reasonable doubt, you may consider them together with all other facts and circumstances in deciding whether or not the defendant is guilty of [obtaining property by false pretenses].

N.C.P.I.—Crim. 104.40 (June 2018) (footnote omitted). The trial court did err by failing to provide the entire instruction. *See State v. Anderson*, 162 N.C. 571, 574-75, 77 S.E. 238, 239 (1913) (holding it was error for the trial court to instruct on the doctrine of recent possession without specifying that if a reasonable explanation for the defendant's possession exists and raises a reasonable doubt of guilt, the defendant is entitled to acquittal) However, again, no objection was made to the trial court's reading of the instruction in its incomplete form. In his main Brief, Defendant does not argue the incompleteness of the instruction was error. In his Reply Brief, however, Defendant contends this contributed to the prejudicial nature of the trial court's giving the instruction at all. Based on our plain error analysis and in light of the evidence presented at trial, we disagree.

(citations omitted); *see also Davis*, 230 N.C. App. at 56, 748 S.E.2d at 193 (explaining where sufficient evidence supported each element of the offense, an erroneous jury instruction on acting in concert—a theory the State was not required to use in order to convict the defendant—did not rise to the level of plain error).

For instance, Officer Davis testified Hickman reported fraudulent charges made on her debit card in Burlington and told Officer Davis that “[Defendant] had taken her debit card while they were at White Lake and that he had made multiple charges.” Officer Davis testified Defendant was convicted in Alamance County for obtaining property by false pretenses based on these fraudulent charges and that Officer Davis notified Deputy Guyton about her investigation because several allegedly fraudulent charges were also made in Bladen County. Deputy Guyton then testified Hickman reported the funds withdrawn from her account on 3 March 2016 in Elizabethtown, Bladen County. Deputy Guyton testified he communicated with Officer Davis about her investigation into Defendant and later identified Defendant as the individual who withdrew the funds from Hickman’s debit card on 3 March 2016.

Further, Hickman testified in Defendant’s defense that although she gave Defendant her debit card (believing it had been canceled), she did not intend for Defendant to withdraw money from her account and that Defendant had obtained the \$406.00 on 3 March 2016 without her permission. When Defendant returned

Hickman's debit card to her on 3 March 2016, he neither corrected her when she stated, "I told you it didn't work[.]" nor informed her that he had withdrawn money from her account. *See Parker*, 354 N.C. at 284, 553 S.E.2d at 897 (explaining a defendant's fraudulent intent "need not come through spoken words, but instead may be by act or conduct" (citations omitted)).

Because sufficient evidence of Defendant's fraudulent intent existed to support submission of the Obtaining-Property-by-False-Pretenses charge to the jury, Defendant cannot establish the trial court's jury instruction on the doctrine of recent possession had a probable impact on the jury verdict.<sup>5</sup> *See Davis*, 230 N.C. App. at 56, 748 S.E.2d at 193. Therefore, the trial court did not commit plain error by instructing the jury on this doctrine.

## II. Ineffective Assistance of Counsel

Lastly, Defendant claims he was potentially denied effective assistance of counsel in violation of the Sixth Amendment. Specifically, Defendant faults Defense Counsel for failing to reasonably investigate whether the video tape of him using the debit card with Hickman existed, which could have aided Defendant in his defense. Defendant contends Defense Counsel's potential failure to investigate this video

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<sup>5</sup> The doctrine of recent possession allows for a presumption "that the possessor of stolen property is guilty of larceny." *Callahan*, 83 N.C. App. at 325, 350 S.E.2d at 130 (citation omitted). Accordingly, this doctrine allows a jury to infer the person in possession of the recently stolen goods was the thief. *See id.* (citation omitted). Here, however, the identity of who took the card was not at issue; rather, the issue was whether Defendant was authorized to use the card to actually obtain funds. Therefore, the applicability of the doctrine in this case is, at best, arguable.

footage could have breached Defense Counsel's duty to investigate Defendant's case. *See State v. Dockery*, 78 N.C. App. 190, 191, 336 S.E.2d 719, 721 (1985) (explaining defense counsel in a criminal case has a duty to "investigate the client's case" (citation omitted)).

To succeed on his IAC claim, Defendant "must show that counsel's representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694, 80 L. Ed. 2d 674, 693, 698 (1984); *see also State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985) (adopting *Strickland* standard for IAC claims under N.C. Const. art. 1, §§ 19, 23). In addition, "[D]efendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy" inasmuch as "[t]here are countless ways to provide effective assistance in any given case." *Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 694-95 (citation and quotation marks omitted).

"In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001) (citations omitted). "IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and

argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing.” *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (citations omitted). However, “should the reviewing court determine that IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant’s right to reassert them during a subsequent MAR proceeding.” *Id.* at 167, 557 S.E.2d at 525 (citation omitted); *see also State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (“[W]hen it appears to the appellate court further development of the facts would be required before application of the *Strickland* test, the proper course is for the Court to dismiss the defendant’s [IAC claim] without prejudice.” (citation omitted)).

Here, we are unable to decide Defendant’s IAC claim based on the “cold record” on appeal. *Fair*, 354 N.C. at 166, 557 S.E.2d at 524 (citation omitted). For instance, the Record before us suggests a factual conflict on when Defense Counsel first learned of the allegedly exculpatory video footage. Defendant claimed he repeatedly notified Defense Counsel of the purported video footage over a thirty-one-month period prior to trial. Defense Counsel, however, asserted she only learned of Defendant’s request the day Defendant’s trial began. We thus conclude, “further development of the facts would be required before application of the *Strickland* test[.]” *Allen*, 360 N.C. at 316, 626 S.E.2d at 286 (citation omitted). Therefore, we dismiss without prejudice

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Defendant's IAC claim so that Defendant may raise it before the trial court in a motion for appropriate relief.

**Conclusion**

Accordingly, for the foregoing reasons, we conclude there was no plain error in Defendant's trial. We dismiss Defendant's IAC claim without prejudice.

NO PLAIN ERROR IN PART; DISMISSED WITHOUT PREJUDICE IN PART.

Judges ARROWOOD and COLLINS concur.

Report per Rule 30(e).