IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-165

No. COA20-252

Filed 20 April 2021

Lincoln County, No. 17 CRS 51768

STATE OF NORTH CAROLINA

v.

BENJAMIN LEWIS HELTON, II

Appeal by defendant from judgment entered 13 August 2019 by Judge Todd Pomeroy in Lincoln County Superior Court. Heard in the Court of Appeals 24 March 2021.

Joshua H. Stein, Attorney General, by Assistant Attorney General Torrey D. Dixon, for the State.

Glenn Gerding, Appellate Defender, by Assistant Appellant Defender Emily Holmes Davis, for defendant.

ARROWOOD, Judge.

¶ 1 Benjamin Lewis Helton, II ("defendant") petitions this Court for *writ of certiorari* to hear his appeal of judgment entered following his conviction for notarizing a vehicle title without the principal appearing in person and with intent to commit fraud in violation of N.C. Gen. Stat. § 10B-60(d). For the following reasons,

we allow the petition for *writ of certiorari* and reverse defendant's conviction under N.C. Gen. Stat. § 10B-60(d).

I. Background

¶ 2 In 2016, Amanda Barnett ("Ms. Barnett") and defendant were hired to work at a car dealership owned by Nicholas Paulino ("Mr. Paulino"). Ms. Barnett was brought on as a manager and defendant as a sales associate. Mr. Paulino did not authorize either employee to sign dealer reassignment forms or any other document transferring title of vehicles on behalf of himself or the dealership.

¶ 3 On 23 September 2016, Nicholas Pelfrey ("Mr. Pelfrey") sold a 1998 Mitsubishi Eclipse to the dealership. During this transaction, Mr. Pelfrey met only with Ms. Barnett and defendant. Mr. Pelfrey testified that defendant filled in the buyer's portion of the documents consummating the dealership's purchase of the Mitsubishi and that Ms. Barnett notarized the papers. The purchase documents identify Ms. Barnett as the notary and include her signature and notary stamp and seal. The stamps on these papers state the following: "Amanda Hope Barnett, NOTARY PUBLIC, Catawba County, NC, My Commission Expires 2-15-2017." Moreover, in these documents, Mr. Paulino was identified as the buyer although no buyer's signature appeared in the materials; Mr. Paulino's name was simply printed in the buyer's portion of the papers. Mr. Paulino testified that he did not authorize the dealership's purchase of this vehicle, was not present when the purchase was

completed, and did not sign any document related to the dealership's purchase of the Mitsubishi.

¶ 4 On 26 September 2016, again without Mr. Paulino's authorization or knowledge, Ms. Barnett and defendant sold the Mitsubishi to a third-party purchaser, Noah Vierheller ("Mr. Vierheller"). Similar to the transaction with Mr. Pelfrey, Mr. Vierheller met only with Ms. Barnett and defendant during which time Mr. Vierheller signed the reassignment of title, bill of sale, and title application vis-à-vis the Mitsubishi. Mr. Vierheller testified at trial that Ms. Barnett notarized the aforesaid documents. Indeed, all relevant documents—including the "Dealer's Reassignment of Title to a Motor Vehicle," "Bill of Sale," and "Title Application"—were signed by Ms. Barnett as a notary public and stamped with her official notary seal. Mr. Paulino was identified as the seller in the documents, and his signature was forged into the reassignment of title and bill of sale. Mr. Paulino testified that he was not aware of the sale, was not present when the sale was completed, and that he did not sign any papers associated with this transaction.

¶ 5 Neither defendant's signature nor his name appear on any document concerning the purchase or sale of the Mitsubishi. There is simply no mention of defendant in any of the documents consummating the transactions with Mr. Pelfrey and Mr. Vierheller. The record and testimony at trial indicate that defendant's involvement was limited to being present at the time of the transactions and that,

according to Mr. Pelfrey, defendant completed the buyer's portion of the documents effectuating the dealership's initial purchase of the Mitsubishi (though he did not sign on the buyer's behalf).

¶ 6 On 13 August 2019, this case was tried in Lincoln County Superior Court on indictments alleging twelve charges associated with the sale of several motor vehicles. At the close of the State's case in chief, the trial court granted defendant's motion to dismiss nine of the twelve charges for insufficient evidence. The remaining three charges, all associated with the sale of the same vehicle (the Mitsubishi Eclipse), were submitted to the jury: (1) notarizing a vehicle title without the principal appearing in person and with intent to commit fraud; (2) altering a vehicle title; and (3) making a false affidavit. The jury convicted defendant of notarizing a vehicle title with intent to commit fraud and acquitted him of all remaining charges. Defendant was sentenced to five to fifteen months' imprisonment, suspended for eighteen months of probation. Defendant filed a *pro se* notice of appeal on 15 August 2019. Due to undisputed technical deficiencies in his notice of appeal, defendant also petitioned this Court for *writ of certiorari* to hear his appeal under Rule 21(a)(1) of the North Carolina Rules of Appellate Procedure. In our discretion, we allow the petition.

II. Discussion

¶ 7 Defendant argues that the trial court erred by denying his motion to dismiss the charge of notarizing a vehicle title without the principal appearing in person and with the intent to commit fraud under N.C. Gen. Stat. § 10B-60(d). Specifically, defendant argues that the State failed to establish that he was a "notary" as that term is defined by N.C. Gen. Stat. § 10B-3(13). Defendant maintains that such a showing is a condition precedent for a conviction under N.C. Gen. Stat. § 10B-60(d). For these reasons, defendant contends that his conviction must be overturned. We agree.

A. Motion to Dismiss

¶ 8 "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) (citing *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982)). In ruling on a motion to dismiss, "the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (internal quotation marks and citations omitted). Substantial evidence has been defined by our North Carolina Supreme Court as "evidence which a reasonable mind could accept as adequate to support a conclusion." *State v. Lee,* 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998) (citing *State v. Vick,* 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995)). In reviewing the trial court's decision on appeal, the evidence must be viewed "in the light most

favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citation omitted).

¶ 9 In order to be submitted to the jury for determination of defendant's guilt, the evidence "need only give rise to a reasonable inference of guilt." *State v. Turnage*, 362 N.C. 491, 494, 666 S.E.2d 753, 755 (2008) (citing *State v. Stone,* 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988)). This is true regardless of whether the evidence is direct or circumstantial. *State v. Trull,* 349 N.C. 428, 447, 509 S.E.2d 178, 191 (1998). If the court decides that a reasonable inference of the 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 them beyond a reasonable doubt that the defendant is actually guilty." *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (citation and emphasis omitted). When ruling on a motion to dismiss, the only question for the trial court is whether "the evidence is sufficient to get the case to the jury; it should not be concerned with the weight of the evidence." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982) (citing *State v. McNeil*, 280 N.C. 159, 162, 185 S.E.2d 156, 157 (1971)).

¶ 10 With respect to the Mitsubishi, defendant was indicted for violating N.C. Gen. Stat. § 10B-60(d)(1) by "tak[ing] an acknowledgment and notariz[ing] the title to a 1998 Mitsubishi Eclipse . . . without the principal, Nicholas Paulino, appearing in person before the notary and with the intent to commit a fraud." N.C. Gen. Stat. §

10B-60(d)(1)-(2) states the following:

> A notary shall be guilty of a Class I felony if the notary does any of the following:
>
> (1) Takes an acknowledgment or a verification or a proof, or administers an oath or affirmation if the notary knows it is false or fraudulent.
>
> (2) Takes an acknowledgment or administers an oath or affirmation without the principal appearing in person before the notary if the notary does so with the intent to commit fraud.

N.C. Gen. Stat. § 10B-60(d)(1)-(2) (2019).

¶ 11 At trial, the jury was instructed that the State must prove three elements beyond a reasonable doubt to convict defendant of an offense under this provision: (1) defendant took an acknowledgment and notarized the title to the subject vehicle; (2) defendant did so without the principal, Mr. Paulino, appearing in person before the notary; and (3) defendant acted with the intent to commit a fraud.[1] During the charge conference, the trial judge asked whether any party had an objection to this instruction: neither the State nor defense counsel objected to the instruction—

[1] This instruction is consistent with the statutory language in N.C. Gen. Stat. § 10B-60(d)(2). *Compare* N.C. Gen. Stat. § 10B-60(d)(2) (stating that a notary shall be guilty of a Class I felony if he "[t]akes an acknowledgment . . . without the principal appearing in person before the notary if the notary does so with the intent to commit fraud"), *with* N.C. Gen. Stat. § 10B-60(d)(1) (stating that a notary shall be guilty of a Class I felony if he "[t]akes an acknowledgment or a verification or a proof, or administers an oath or affirmation if the notary knows it is false or fraudulent.").

indeed, both parties agreed that the charge was proper. The State, however, requested that the jury be instructed that it could find defendant guilty of violating N.C. Gen. Stat. § 10B-60(d) under a theory of acting in concert or aiding and abetting. This request clearly derived from the fact that Ms. Barnett was the notary—not defendant—and that she signed, stamped, and sealed the documents associated with the purchase and sale of the Mitsubishi. The trial judge declined to give this instruction.

¶ 12 On appeal, the State argues that the trial court erred by refusing to instruct the jury on the theory of acting in concert as requested by the State; however, the government maintains that this error was harmless (and perhaps helpful) to defendant because the State had already produced substantial evidence that defendant acted in concert with Ms. Barnett to notarize the subject documents with the intent to defraud the dealership. The State's theory, in large part, is based on testimony suggesting that defendant had a prior history of working with Ms. Barnett and that the two were involved in a romantic relationship.

¶ 13 "Because the jury was never told that it could convict defendant if it found that he acted in concert with others in the commission of the elements of each of the offenses, the State had to satisfy the jury that defendant personally committed every element of each offense." *State v. Smith*, 65 N.C. App. 770, 772, 310 S.E.2d 115, 116-

17, *aff'd as modified*, 311 N.C. 145, 316 S.E.2d 75 (1984). The State's case then succeeds or fails under that theory.

¶ 14 Here, the only theory of defendant's guilt submitted to the jury was that defendant himself committed every element of each of the charged offenses. However, the State failed to present any, much less substantial, evidence of an essential element of the offense brought pursuant to N.C. Gen. Stat. § 10B-60(d): namely, that defendant was a "notary" as defined by N.C. Gen. Stat. § 10B-3(13).

¶ 15 Per the plain language of N.C. Gen. Stat. § 10B-60(d)(2), a "**notary** shall be guilty of a Class I felony if the **notary** . . . [t]akes an acknowledgment or administers an oath or affirmation without the principal appearing in person before the **notary** if the **notary** does so with the intent to commit fraud." N.C. Gen. Stat. § 10B-60(d)(2) (emphasis added). A "notary" is defined as "[a] person commissioned to perform notarial acts under [the Notary Public Act]. A notary is a public officer of the State of North Carolina and shall act in full and strict compliance with th[e] act." N.C. Gen. Stat. § 10B-3(13) (2019). A "notarial act" is the "act of taking an acknowledgment, taking a verification or proof or administering an oath or affirmation that a notary is empowered to perform under G.S. 10B-20(a) ["Powers and limitations" of a notary]." N.C. Gen. Stat. § 10B-3(11). Thus, while the case law is scant on what constitutes sufficient evidence to find that a person was a "notary" (that is, a "person commissioned to perform notarial acts"), we believe that the

unambiguous language of N.C. Gen. Stat. § 10B-60(d) requires the State to present at least some evidence from which a reasonable mind could accept as adequate to support the conclusion that defendant was a "notary" as that term is defined under the Notary Public Act, specifically N.C. Gen. Stat. § 10B-3(13). *See Lee*, 348 N.C. at 488, 501 S.E.2d at 343; *cf. Hunt v. N.C. Dep't of Pub. Safety*, 266 N.C. App. 24, 29, 830 S.E.2d 865, 868 (2019) (" 'Questions of statutory interpretation are ultimately questions of law for the courts and are reviewed de novo. The principal goal of statutory construction is to accomplish the legislative intent.' ") (quoting *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 547, 809 S.E.2d 853, 858 (2018)).

¶ 16 Here, the record is devoid of any evidence suggesting that defendant was a notary, that is, a person commissioned to perform notarial acts and a public officer of the State of North Carolina governed by the Notary Public Act. We therefore conclude that the State failed to present sufficient evidence of a violation of N.C. Gen. Stat. § 10B-60(d) to withstand defendant's motion to dismiss. *See State v. Cunningham*, 140 N.C. App. 315, 321, 536 S.E.2d 341, 346 (2000*)* (vacating conviction where jury was not instructed on acting in concert theory and government failed to present substantial evidence of defendant's guilt as to each element of the offense charged); *accord Chiarella v. United States*, 445 U.S. 222, 236, 63 L. Ed. 2d 348, 362 (1980) (restating well-established principle that a criminal conviction cannot be affirmed on the basis of a theory not presented to the jury).

¶ 17 Furthermore, the indictment connected to the Mitsubishi vehicle does not suggest or otherwise indicate that the State's litigation theory was that defendant was acting in concert with Ms. Barnett and thus vicariously responsible for the crime. It appears that the first time this theory was raised occurred outside the presence of the jury during oral arguments related to defendant's motions to dismiss: "Obviously [defendant is] not a notary charged, and the State would be proceeding under a theory of acting in concert for those charges." In short, we find that (1) the trial judge properly declined to give the State's requested instruction on its purported theory of acting in concert because the operative indictment makes no mention of the State's intention to proceed under this theory, and (2) the State failed to produce substantial evidence in support of each essential element of the charge brought under N.C. Gen. Stat. § 10B-60(d).

¶ 18 For these reasons, the trial court erred by denying defendant's motion to dismiss the notary charge connected to the purchase and sale of the 1998 Mitsubishi Eclipse. We thus reverse defendant's conviction for allegedly violating N.C. Gen. Stat. § 10B-60(d).

III. Conclusion

¶ 19 For the foregoing reasons, we reverse defendant's conviction.

REVERSED.

Judges HAMPSON and CARPENTER concur.

Report per Rule 30(e).