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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-735

No. COA22-39

Filed 1 November 2022

Pitt County, No. 16 CRS 55574

STATE OF NORTH CAROLINA

v.

TINA JARACZEWSKI WILSON

Appeal by defendant from judgment entered 22 July 2021 by Judge Eula E. Reid in Pitt County Superior Court. Heard in the Court of Appeals 23 August 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kimberley A. D'Arruda, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Candace Washington, for defendant.

DIETZ, Judge.

¶ 1 Defendant Tina Wilson appeals her convictions for embezzlement and obtaining property by false pretenses. She contends that there was insufficient evidence to support the charge of obtaining property by false pretenses. She also asserts several unpreserved evidentiary arguments concerning the admission of bank records.

¶ 2 As explained below, there was insufficient evidence to support the charge of

obtaining property by false pretenses and we reverse that conviction. We find no plain error in Wilson's remaining arguments. We remand for resentencing on the remaining convictions.

Facts and Procedural History

¶ 3 Billy Britton Laughinghouse owned Bostic-Sugg Furniture Company, a retail furniture company in Greenville, North Carolina. Wilson worked in the office at Bostic-Sugg for approximately twenty years. Wilson handled human resources work, including general bookkeeping for the company and payroll for the company's employees. In addition, Wilson managed bills and business tax issues and was responsible for the company checkbook. Wilson had the authority to sign checks.

¶ 4 In June 2016, the North Carolina Department of Revenue informed Laughinghouse that the furniture store was delinquent on its taxes. Laughinghouse and Wilson met with the Department of Revenue. Laughinghouse testified that Wilson said, "it was all taken care of," but the Department of Revenue informed Laughinghouse that the company was still in arrears. According to Laughinghouse, the company owed the State roughly $150,000 in back taxes. After a follow-up internal meeting to address the tax issue, Laughinghouse fired Wilson.

¶ 5 Lisa Laughinghouse Woodard also worked at the furniture store and testified that she and the company's accountant started investigating the tax issue after Wilson's termination. Woodard testified that, during this internal investigation, she

noticed a discrepancy in the payroll amounts paid to Wilson. Woodard reviewed the bank records for the company's accounts with Wells Fargo and Trust Atlantic/First Tennessee Bank. In those records, there was a pattern of unauthorized checks written to Alfrazer Bullock, another company employee. Those checks to Bullock were cashed on a regular basis, going back to 2013. The extra checks did not match any payroll or authorized expense amounts.

¶ 6 Alfrazer Bullock later admitted that Wilson asked him to cash company checks and bring her cash in an envelope. Laughinghouse and Woodard also reviewed the payroll records for Wilson over several years and found unauthorized payroll deposits to Wilson.

¶ 7 The State ultimately charged Wilson with two counts of embezzlement and one count of obtaining property by false pretenses. The first count of embezzlement was based on checks drawn from the company's account at Trust Atlantic/First Tennessee Bank. The second count of embezzlement was based on checks drawn from a Wells Fargo account. The charge of obtaining property by false pretenses was based on the additional payroll deposits that Wilson received from the company without authorization.

¶ 8 The case went to trial. During the trial, the State presented Wells Fargo bank records documenting the allegedly wrongful transactions, accompanied by declarations from Wells Fargo employees declaring under penalty of perjury that the

business records were accurate. The declarations were not notarized. Special Investigator Tammy Forsythe with the North Carolina State Bureau of Investigation reviewed spreadsheets of this information compiled by Wells Fargo and testified about the information at trial.

¶ 9 At the close of the State's evidence, and again at the close of all the evidence, Wilson moved to dismiss the charges for insufficiency of the evidence. The trial court denied the motions. The jury found Wilson guilty of the three charges. The trial court sentenced Wilson to 73 to 100 months in prison for one count of embezzlement and a consolidated, consecutive sentence of 73 to 100 months in prison for the second count of embezzlement and the charge of obtaining property by false pretenses. Wilson timely appealed.

Analysis

I. Obtaining property by false pretenses

¶ 10 Wilson first argues that the trial court erred by denying her motion to dismiss the charge of obtaining property by false pretenses. Wilson argues that the State failed to provide sufficient evidence that she obtained the furniture company's funds in the form of payroll deposits by false pretenses. Because the evidence showed that Wilson was entrusted with the company's funds, and thus had lawful possession by virtue of her employment and authority at the company, we agree that the trial court erred by denying the motion to dismiss.

¶ 11 "In reviewing a motion to dismiss based on the sufficiency of the evidence, the scope of the court's review is to determine whether there is substantial evidence of each element of the charged offense." *State v. Hardison*, 243 N.C. App. 723, 726, 779 S.E.2d 505, 507 (2015). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* "The evidence must be considered in the light most favorable to the State as the State is entitled to every reasonable inference that might be drawn therefrom." *Id.*

¶ 12 With these principles in mind, we turn to the essential elements of obtaining property by false pretenses, which 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." *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980); N.C. Gen. Stat. § 14-100.

¶ 13 Importantly, the "crimes of embezzlement and false pretenses are mutually exclusive offenses." *State v. Murphy*, 152 N.C. App. 335, 343, 567 S.E.2d 442, 447 (2002). "Embezzlement is the wrongful conversion of property which was initially acquired lawfully, pursuant to a trust relationship." *Id.* "On the other hand, false pretenses is the unlawful acquisition of property, pursuant to a false representation." *Id.*

¶ 14 Here, the State's evidence did not support the charge of obtaining property by

false pretenses. Wilson was responsible for the company's general bookkeeping and payroll duties, including processing and paying employee salaries. Wilson managed the company's direct deposit system and was the employee at the company authorized to change the amounts paid through direct deposit payments to employees. Thus, the undisputed evidence at trial demonstrated that Wilson had *lawful* possession of these company funds through her position of trust in the company and wrongfully converted those funds by changing her payroll without authority from higher management. There is no evidence that Wilson unlawfully acquired access to this payroll system or unlawfully obtained control over the funds she deposited through her payroll in excess of the authorized amounts. Thus, the trial court should have granted Wilson's motion to dismiss this charge. We therefore reverse Wilson's conviction for obtaining property by false pretenses and remand for resentencing on the remaining charges.

II. Evidentiary challenges

¶ 15 Wilson next argues that the trial committed plain error by admitting bank records and corresponding testimony because the foundational declarations were not notarized and thus were not properly considered affidavits. Wilson concedes that she did not object to the admission of the evidence and testimony and we therefore review it solely for plain error.

¶ 16 "For error to constitute plain error, a defendant must demonstrate that a

fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "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." *Id.* Plain error should be "applied cautiously and only in the exceptional case" where the error seriously affects "the fairness, integrity or public reputation of judicial proceedings." *Id.*

¶ 17 There are many ways to authenticate evidence, and "the ultimate inquiry for the trial court is whether there exists evidence sufficient to support a finding that the matter in question is what its proponent claims." *State v. DeJesus*, 265 N.C. App. 279, 288, 827 S.E.2d 744, 751 (2019). Certain types of business records can be authenticated without additional evidence through affidavits: "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to . . . [d]ocuments accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments." N.C. R. Evid. 902(8).

¶ 18 Here, the State presented declarations from Wells Fargo employees declaring under penalty of perjury that the declarants were qualified witnesses to certify the authenticity of the bank records produced pursuant to a legal order. The declarants confirmed that the documents were prepared by Wells Fargo employees in the ordinary course of business near the time of the events. But, importantly, these

declarations were not notarized, which is a typical requirement of affidavits. Nevertheless, our Supreme Court has recognized that this sort of declaration, in the absence of a notarization, may still suffice to warrant admission of the declaration:

> [A]ffidavits may be valid and acceptable in some circumstances even when not sworn to in the presence of an authorized officer.
>
> One such circumstance is when an affidavit is submitted under penalty of perjury. Affidavits without notarization may still be substantially credible. When a statement is given under penalty of perjury, it alerts the witness of the duty to tell the truth and the possible punishment that could result if she does not. The form of the administration of the oath is immaterial, provided that it involves the mind of the witness, the bringing to bear [of the] apprehension of punishment [for untruthful testimony].

Gyger v. Clement, 375 N.C. 80, 85, 846 S.E.2d 496, 500 (2020).

¶ 19 In light of this precedent, we are not persuaded that it was error to admit the challenged evidence and accompanying testimony. But, even assuming there was an error, that error is not the sort of fundamental, exceptional error that deprived Wilson of a fair trial and calls into question the fairness, integrity or public reputation of judicial proceedings. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Accordingly, we find no plain error in the trial court's admission of the challenged evidence.

Conclusion

¶ 20 We find no plain error in the embezzlement convictions but reverse the conviction for obtaining property by false pretenses. We remand for resentencing on

the remaining convictions.

NO PLAIN ERROR IN PART, REVERSED IN PART, AND REMANDED.

Chief Judge STROUD and Judge ZACHARY concur.

Report per Rule 30(e).