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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-712

Filed 21 March 2023

Forsyth County, No. 17 CRS 57185

STATE OF NORTH CAROLINA

v.

COLIN BRENT JONES, JR.

Appeal by defendant from judgment entered 15 March 2022 by Judge David L. Hall in Forsyth County Superior Court. Heard in the Court of Appeals 21 February 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Kunal J. Choksi, for the State.

Leslie Rawls for defendant.

ARROWOOD, Judge.

Colin Brent Jones, Jr. (“defendant”), appeals from judgment convicting him of uttering a forged instrument. Defendant asserts he received ineffective assistance of counsel due to his counsel’s failure to request the lesser-included offenses of misdemeanor common law uttering or attempted misdemeanor common law uttering. For the reasons stated herein, we find no error.

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I. Background

On 14 June 2019, defendant was indicted by a Forsyth County Grand Jury on two counts of attempt to obtain property by false pretenses and one count of uttering a forged instrument. The matters came on for trial during the 14 March 2022 Criminal Session of Forsyth County Superior Court, Judge Hall presiding. Defendant did not present any evidence at trial. The State's evidence tended to show the following:

On 12 July 2017, defendant presented a check for \$1,000.00 to the teller at the Emergency Responder's Credit Union in Winston-Salem which contained the names Raymond B. Hurley and Paula R. Hurley. The check was made payable to defendant for alleged "computer work." The teller hesitated before depositing the check as she knew Raymond Hurley was the credit union's CEO's son-in-law. After talking with the CEO and confirming that her son-in-law did not write the check, they called law enforcement.

Corporal Kevin Wagoner ("Corporal Wagoner") initiated the investigation and conducted an interview with defendant that same day. Defendant told Corporal Wagoner that he "runs his own computer repair business" and received the check a few days prior from someone named "Brandon" in exchange for performing some upgrades on his computer. Defendant was unsure of Brandon's last name and said it may be "Hairston[.]" Corporal Wagoner searched the name Brandon Hairston in the sheriff department's database which did not return any results. Corporal Wagoner

also entered the phone number defendant had for Brandon into the database, which did not come back to anyone named Brandon. Defendant was also asked “why he would take a personal check from someone he . . . knew as Brandon or Brandon Hairston when the check . . . indicated that it belonged to a Raymond or Paula Hurley[.]” Defendant was unable to provide a clear answer and at one point suggested “maybe Brandon took his wife’s maiden name[.]”

Corporal Wagoner interviewed defendant for a second time on 20 July 2017. Through further investigation, Corporal Wagoner learned of three additional checks defendant had attempted to deposit in an ATM at his own bank. Defendant could not provide Corporal Wagoner with a “work order” or “any kind of bill of sale” for his work. Corporal Wagoner believed defendant indicated the check for \$1,000.00 was for purported repair work, and the two additional checks were for “rebuilding [a] supercomputer.”

Raymond Hurley, an Information Technology professional, testified that he would not have written a check for someone to do computer repair work and did not write the checks in defendant’s possession.

At the close of the State’s evidence, defendant moved to dismiss all charges. The court granted the dismissal as to the first count of attempting to obtain property by false pretenses and the remaining two charges were submitted to the jury. Defendant was found not guilty of attempting to obtain property by false pretenses and guilty as to uttering a forged instrument. Defendant was sentenced to a term of

5 to 15 months, suspended for 24 months and placed on supervised probation. Defendant timely appealed.

II. Discussion

Defendant contends he received ineffective assistance of counsel due to his counsel's failure to request the lesser-included misdemeanor offenses of common law uttering or attempted misdemeanor uttering. We disagree.

"A defendant's right to counsel includes the right to the effective assistance of counsel. When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 247-48 (1985) (citations omitted).

In order to meet this burden defendant must satisfy a two part test[:] [f]irst, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's error w[as] so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable*.

Id. at 562, 324 S.E.2d at 248 (emphasis in original) (citation and internal quotation marks omitted).

"[I]n considering ineffective assistance of counsel claims, if a reviewing court can determine at the outset that there is no reasonable probability that in the absence

of counsel’s alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel’s performance was actually deficient.” *State v. Covington*, 248 N.C. App. 698, 706, 788 S.E.2d 671, 677 (2016) (citation and internal quotation marks omitted).

A defendant is not “entitled to have a lesser-included offense submitted to the jury . . . [unless] there is evidence to support it.” *Id.* at 702, 788 S.E.2d at 675 (citation omitted). Our case law states:

[t]he test in every case involving the propriety of an instruction on a lesser grade of an offense is not whether the jury could convict defendant of the lesser crime, but whether the State’s evidence is *positive* as to each element of the crime charged and whether there is any conflicting evidence relating to any of these elements.

Id. (emphasis added) (citation omitted). “‘Where no lesser[-]included offense exists, a lesser[-]included offense instruction detracts from, rather than enhances, the rationality of the process.’” *Id.* (citation omitted).

“The essential elements of the crime of uttering a forged check are (1) the offer of a forged check to another, (2) with knowledge that the check is false, and (3) with the intent to defraud or injure another.” *State v. Hill*, 31 N.C. App. 248, 249, 229 S.E.2d 810, 810 (1976) (citations omitted). “There is a presumption that one in possession of a forged instrument, who attempts to obtain money or goods with that instrument, has either forged or consented to the forging of the instrument.” *State v. Seraphem*, 90 N.C. App. 368, 373, 368 S.E.2d 643, 646 (1988) (citation omitted). Thus,

“[t]he mere offer of the false instrument with fraudulent intent constitutes an uttering.” *Id.* (citation omitted).

Here, defendant concedes that “[t]he State’s evidence . . . tended to show that [defendant] presented a writing capable of effecting a fraud with the intent to defraud, knowing the document was false.” Defendant was in possession of the check and attempted to portray it as payment he had received from an unidentified individual. Raymond Hurley also testified that he did not write the check, nor did he pay someone for computer repair work. Furthermore, defendant did not present evidence at trial nor elicit conflicting evidence during cross-examination. Thus, “the State’s evidence [wa]s positive as to each element of the crime charged[.]” *Covington*, 248 N.C. App. at 702, 788 S.E.2d at 675.

Because defendant was not entitled to an instruction on the lesser-included offense in this case, any request would have been futile. *Id.* at 706, 788 S.E.2d at 678. *See also State v. Lucas*, 234 N.C. App. 247, 258-59, 758 S.E.2d 672, 680 (2014) (“A successful ineffective assistance of counsel claim based on a failure to request a jury instruction requires the defendant to prove that without the requested jury instruction there was plain error in the charge. Here, we have already determined that the trial court did not commit plain error[.] . . . Accordingly, we cannot conclude that their counsel’s failure to request these instructions constituted ineffective assistance of counsel.”) (citations and internal quotation marks omitted).

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We also note that defendant’s counsel made multiple objections throughout the proceeding and successfully argued for the dismissal of one count of attempting to obtain property by false pretenses. Thus, defendant has failed to present evidence rebutting the “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *State v. Oglesby*, 382 N.C. 235, 243, 876 S.E.2d 249, 256 (2022) (citation and internal quotation marks omitted). Because “[c]ounsel is given wide latitude in matters of strategy, . . . the burden to show that counsel’s performance fell short . . . is a heavy one for defendant to bear.” *Id.* (internal quotation marks omitted). Defendant’s argument is overruled.

III. Conclusion

For the reasons set forth above, we conclude defendant received a fair trial free from error.

NO ERROR.

Chief Judge STROUD and Judge TYSON concur.

Report per Rule 30(e).