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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-268

Filed 2 April 2025

Cabarrus County, No. 18 CRS 055192

STATE OF NORTH CAROLINA

v.

NICHOLAS HARVELL

Appeal by Defendant from Judgment entered 27 June 2023 by Judge Martin B. McGee in Cabarrus County Superior Court. Heard in the Court of Appeals 23 October 2024.

Attorney General Jeff Jackson, by Special Deputy Attorney General Asa C. Edwards IV, for the State.

Caryn Strickland for Defendant.

HAMPSON, Judge.

Factual and Procedural Background

Nicholas Scott Harvell (Defendant) appeals from the trial court's Order denying his Motion to Dismiss and from a Judgment entered upon jury verdicts finding him guilty of Drawing, Making, or Uttering a Worthless Check and

Attempting to Obtain Property by False Pretenses.¹ The Record before us tends to reflect the following:

Defendant primarily resides in Florida; however, at the time of the events at issue, Defendant was living or working in North Carolina. Amber Lynn Atcher, the alleged victim, resides in Concord, North Carolina. Defendant and Atcher are parents of a child, born in 2015. Although Defendant's paternity was not established until 2021, Defendant would voluntarily "[come] around" for special occasions like holidays and birthdays but was not paying child support or subjected to any formal child support obligations.

On 10 August 2018, Defendant contacted Atcher and informed her he had lost his wallet and needed money. Atcher sent Defendant \$100.00 via "moneygram." Defendant indicated he would repay Atcher with a check, which he would bring to her personally in Concord.

The next day, Defendant arrived in Concord and met with Atcher to have her cash the check. While they sat in her car together, Defendant wrote out a check to Atcher for \$4,500.00. Defendant repeatedly misspelled Atcher's name, having to "scratch out" several checks and write new ones until he did so correctly. The account on the check was "NSH Builders," a business of Defendant's.

Defendant and Atcher went inside the bank together to cash the check. The

¹ On appeal, however, Defendant challenges only the conviction for Attempting to Obtain Property by False Pretenses.

bank would not allow Atcher to cash the check. Instead, the check would have to be deposited into Atcher's account with the funds released in two separate disbursements—one for \$200 and one for the remaining \$4,300.00—over the course of several days. Defendant left for Florida the following day, before any disbursements were made to Atcher's account.

On 13 August 2018, believing the first disbursement of funds had deposited in her account, Atcher withdrew \$200 and spent it on “gas [and] groceries.” Later that same day, Atcher received an alert from her bank that her account was overdrawn. Atcher contacted Defendant to ask why the check would be returned and he told her he did not know. Defendant did not respond to Atcher's follow-up inquiries. She was charged an overdraft fee, which the bank later forgave.

The next day, Atcher went to the police. She spoke to Officer Walter Archie, who obtained a search warrant for the bank account associated with the check. Officer Archie's investigation revealed the account was closed and the balance had been zero since March 2017.

On 6 May 2019, Defendant was indicted on one count of Drawing, Making, or Uttering a Worthless Check and one count of Attempting to Obtain Property by False Pretenses. The indictment for Attempting to Obtain Property by False Pretenses describes the “thing of value” Defendant attempted to obtain as the “forgiveness of a debt of \$4,500”:

. . . [Defendant] unlawfully, willfully, and feloniously did attempt

STATE V. HARVELL

Opinion of the Court

to knowingly and designedly, with the intent to cheat and defraud, obtain forgiveness of a debt of \$4,500, a thing of value, from Amberlynn Atcher, by means of a false pretense which was calculated to deceive and did deceive, namely the presentation of a check in the aforesaid amount on a closed account.

The case came on for trial on 26 June 2023. At trial, Atcher testified she had loaned Defendant \$100.00 in exchange for his promise he would write her a check:

[Atcher]: [Defendant] had called me saying that he had lost his debit card and that he needed money. He was trying to go back to Florida, and that if he wrote a check, I could cash it, and then he would need money. He never gave me a certain amount of what he needed, but -- so, yeah, he needed money.

[State]: Okay. Did you send him any money?

[Atcher]: Yes, I did. I moneygrammed him \$100. I believe it was that Friday before. But he had originally asked me for a couple hundred, but I couldn't afford to give him that much money.

Atcher also testified Defendant ultimately wrote out the check payable to her in the amount of \$4,500.00.

At the close of the State's evidence, Defendant moved to dismiss both charges. The trial court denied the Motion. Defendant then testified on his own behalf. According to Defendant, the bank had misprinted the account number on the checks, and he had believed the check was associated with a different account which contained sufficient funds. Defendant testified he wrote the check to Atcher for "child support" and did not intend to keep any of the proceeds from the check for himself.

At the close of all evidence, Defendant renewed his Motion to Dismiss. The trial court again denied the Motion. On 27 June 2023, the jury returned verdicts

finding Defendant guilty of both charges and the trial court entered a Judgment in accordance with the verdicts. Defendant timely filed Notice of Appeal on 10 July 2023.

Appellate Jurisdiction

A written notice of appeal in a criminal case must “specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.” N.C.R. App. P. 4(b) (2024). Defendant filed what appears to be a handwritten, pro se Notice of Appeal, bearing his signature alone. However, it is unclear from the Record whether Defendant was pro se at the time he filed his Notice or whether he was still represented by his trial counsel.² If Defendant was pro se at the time of filing, then his signature alone on the Notice is compliant with Rule 4(b). Conversely, if Defendant was still represented by his trial counsel, then his Notice of Appeal has one deficiency: the lack of signature of his counsel of record.

Recognizing this potential defect in his Notice of Appeal, Defendant’s appellate counsel has filed a Petition for Writ of Certiorari seeking this Court’s review of the 27 June 2023 Judgment. This Court may issue a writ of certiorari “in appropriate

² The State, in its response to Defendant’s Petition for Writ of Certiorari, notes the absence of any documentation in the Record indicating Defendant’s trial counsel had ceased acting as Defendant’s counsel when Defendant filed his Notice of Appeal. In his Notice, however, Defendant requested appointment of counsel, tending to show his trial counsel had already ceased representation.

circumstances . . . to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]” N.C.R. App. P. 21(a)(1) (2024).

Defendant’s Notice of Appeal was timely, indicates his intent to appeal, and designates the Judgment and court from which his appeal is taken. Appellate Entries were entered indicating Defendant had given notice of his appeal and the State was properly served. Furthermore, the State does not assert that it was misled by the Notice of Appeal or prejudiced by the lack of signature.³ *See State v. Springle*, 244 N.C. App. 760, 763, 781 S.E.2d 518, 521 (2016) (“[A] defect in a notice of appeal should not result in loss of the appeal as long as the intent to appeal . . . can be fairly inferred from the notice and the appellee is not misled by the mistake.” (alteration in original) (citation and quotation marks omitted)). Nevertheless, for purposes of ensuring our appellate jurisdiction over Defendant’s appeal, we, in the exercise of our discretion, allow Defendant’s Petition for Writ of Certiorari.

Issue

³ The State argues Defendant’s Petition should be dismissed because his appeal lacks merit and because there was an unreasonable delay between entry of the Judgment and the filing of his Petition. “[O]ur Rules of Appellate Procedure do not set forth a specific time period in which a defendant must file a petition [but] the “petition shall be filed without unreasonable delay[.]” *State v. Rush*, 158 N.C. App. 738, 741, 582 S.E.2d 37, 38-39 (2003) (quotation marks omitted) (citing N.C.R. App. P. 21(c)). The State cites *In re L.R.* as an example of this Court finding a ten month period between the entry of an order and the petition for review of that order unreasonably delayed. 207 N.C. App. 264, 699 S.E.2d 479 (2010) (unpublished). The petitioner in *In re L.R.*, however, had not filed notice of appeal, instead requesting review for the first time in her petition for writ of certiorari. *Id.* at *3. Here, by contrast, Defendant timely filed his Notice of Appeal from the Judgment and has filed his Petition only to correct minor technical deficiencies.

The dispositive issue on appeal is whether the trial court erred by denying Defendant's Motions to Dismiss the charge of Attempting to Obtain Property by False Pretenses.

Analysis

"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) (citation omitted). "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 offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation and quotation marks omitted).

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987) (citation and quotation marks omitted). "Evidence is not substantial if it arouses only a suspicion about the fact to be proved, even if the suspicion is strong." *State v. Sumpter*, 318 N.C. 102, 108, 347 S.E.2d 396, 399 (1986) (citation omitted). "If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion [to dismiss] should be allowed." *Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455 (citation omitted). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light

most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citing *Sumpter*, 318 N.C. at 107, 347 S.E.2d at 399).

Defendant contends the trial court erred in denying his Motion to Dismiss the charge of Attempting to Obtain Property by False Pretenses for insufficient evidence. Specifically, Defendant argues the State failed to present sufficient evidence he attempted to obtain a thing of value.

For the charge of Obtaining Property by False Pretenses, our statutes provide:

If any person shall knowingly and designedly by means of any kind of false pretense whatsoever . . . obtain or attempt to obtain from any person within this State any money, goods, property, services, chose in action, or other thing of value with intent to cheat or defraud any person of such money, goods, property, services, chose in action or other thing of value, such person shall be guilty of a felony[.]

N.C. Gen. Stat. § 14-100(a) (2023). Our Supreme Court has elaborated that the elements of the offense include: “(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).

According to Defendant, the State was required to present evidence he attempted to obtain from Atcher the forgiveness of a debt of \$4,500.00, as specifically alleged in the indictment. Defendant argues the State presented no such evidence and, thus, his conviction must be vacated. Although not expressly made, Defendant’s

argument is, in substance, an argument there was a fatal variance between the charging indictment and the evidence produced at trial.⁴

“A motion to dismiss is in order when the prosecution fails to offer sufficient evidence the defendant committed the offense charged.” *State v. Waddell*, 279 N.C. 442, 445, 183 S.E.2d 644, 646 (1971). “A variance between the criminal offense charged and the offense established by the evidence is in essence a failure of the State to establish the offense charged.” *Id.*

However, “a variance which is not essential is not fatal to the charged offense.” *State v. Qualls*, 130 N.C. App. 1, 8, 502 S.E.2d 31, 36 (1998) (citing *State v. Simmons*, 57 N.C. App. 548, 551, 291 S.E.2d 815, 817 (1982)), *aff’d*, 350 N.C. 56, 510 S.E.2d 376 (1999). “‘A variance will not result where the allegations and proof, although variant, are of the same legal signification.’” *Simmons*, 57 N.C. App. at 551, 291 S.E.2d at 817-18 (quoting *State v. Craft*, 168 N.C. 208, 212, 83 S.E. 772, 774 (1914)) (alteration and internal quotation marks omitted). Moreover, “‘a variance . . . does not require reversal unless the defendant is prejudiced as a result.’” *State v. Glidewell*, 255 N.C. App. 110, 113, 804 S.E.2d 228, 232 (2017) (alteration in original) (quoting *State v. Weaver*, 123 N.C. App. 276, 291, 473 S.E.2d 362, 371 (1996), *disc. rev. denied*, 344 N.C. 636, 477 S.E.2d 53 (1996)).

⁴ We have held a general motion to dismiss based on sufficiency of the evidence preserves a fatal variance argument for our review on appeal. *See State v. Juran*, 294 N.C. App. 81, 85, 901 S.E.2d 872, 876 (2024).

During the State's case-in-chief, Atcher testified she had loaned Defendant \$100.00 for gas in exchange for his promise he would write her a check. Likewise, Defendant testified Atcher had loaned him \$100.00, and he had written her a check in the amount of \$4,500.00. Thus, the State presented substantial evidence Defendant attempted to obtain a thing of value: the forgiveness of a debt in the amount of \$100.00.⁵

The indictment, however, alleged Defendant attempted to "obtain forgiveness of a debt of \$4,500[.]" The alleged variance, therefore, pertains to the value of the debt.

In *State v. Walston*, the defendant was convicted of obtaining property by false pretenses where he had obtained a blank check from his church treasury and used the check to open a checking account in the church's name. 140 N.C. App. 327, 536 S.E.2d 630 (2000). The indictment alleged the defendant "had obtained '\$10,000.00 in United States Currency.'" *Id.* at 335, 536 S.E.2d at 635. On appeal, the defendant argued there was a fatal variance between the indictment and the proof at trial "in that the State failed to show that [he had] obtained \$10,000.00[.]" *Id.* at 334. In holding no fatal variance was shown, this Court observed "the purported variance did not go to an essential element of the offense because whether defendant received

⁵ At oral arguments, Defendant conceded "forgiveness of a debt" is a thing of value. *See also* N.C. Gen. Stat. § 14-100(a) (2023) (including "money, goods, property, services, chose in action, or other thing of value" in definition of "thing of value").

\$10,000.00 in cash or deposited \$10,000.00 in a bank account, he obtained something of monetary value which is the crux of the offense.” *Id.* at 336, 536 S.E.2d at 636.

More recently, this Court has considered the issue of whether there was a fatal variance in *Juran*. There, the defendant was convicted of assault or affray on an emergency medical technician. *Juran*, 294 N.C. App. at 86, 901 S.E.2d at 877. At trial, the victim testified she was a paramedic, rather than an emergency medical technician. *Id.* The defendant argued this created a fatal variance between the offense charged in the indictment and the offense established at trial. *Id.* at 83, 901 S.E.2d at 875. The Court observed “the charging indictment was sufficient such that Defendant could prepare her defense as the indictment included, among other things, the date of the offense, the specific statute under which Defendant was charged, [the victim], and [the victim’s] employer.” *Id.* at 87, 901 S.E.2d at 878. Additionally, the defendant would have been charged under the same statute whether she assaulted a paramedic or an emergency medical technician. *Id.*, 901 S.E.2d at 877.

Here, the State contends, and we agree, the exact value of the debt goes beyond the essential elements of the crime and is thus immaterial to Defendant’s conviction. *See State v. McVay*, 287 N.C. App. 293, 297, 882 S.E.2d 598, 603 (2022) (“When an indictment includes the essential elements of a crime being charged, those allegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage.” (alteration, citation, and quotation marks omitted)), *disc. rev. denied*, _ N.C. _, 887 S.E.2d 881 (2023). The alleged value of the debt does

not alter the ultimate premise that Defendant attempted to obtain forgiveness of a debt by presenting to Atcher a check on a long closed account. Indeed, the State's theory at trial was that Defendant attempted to obtain forgiveness of a debt by means of a check on a closed account—and the State introduced substantial evidence to that effect. *See State v. Taylor*, 304 N.C. 249, 275, 283 S.E.2d 761, 778 (1981) (“[W]here the indictment for a crime alleges a theory of the crime, the State is held to proof of that theory and the jury is only allowed to convict on that theory.”).

Thus, contrary to Defendant's assertion, the State was not required to produce evidence the alleged debt was worth exactly \$4,500.00. Consequently, the purported variance is not fatal because there was sufficient evidence Defendant attempted to obtain something of value—forgiveness of a debt—by false pretenses, which is the crux of the offense. *See Walston*, 140 N.C. App. at 336, 536 S.E.2d at 636. *See also State v. Wilson*, 34 N.C. App. 474, 476, 238 S.E.2d 632, 634 (1977) (“The gist of the offense described in G.S. 14-100 is obtaining something of value from the owner thereof by false pretense.”), *rev. denied and appeal dismissed*, 294 N.C. 188, 241 S.E.2d 72 (1977). Here, the gist of the offense charged is that Defendant attempted to obtain forgiveness of a debt by writing the \$4,500.00 check to Atcher on a long closed account.

Moreover, as in *Juran*, the indictment included sufficient detail such that Defendant could prepare his defense, including the date of the offense, the specific statute under which he was charged, the identity of the victim, and the allegation he

had attempted to obtain forgiveness of a debt by means of a check on a closed account. Also like *Juran*, Defendant would have been charged under the same statute and for the same class of felony whether the value of the debt was \$100.00 or \$4,500.00. *See* N.C. Gen. Stat. § 14-100(a) (“If the value of the money, goods, property, services, chose in action, or other thing of value is less than one hundred thousand dollars (\$100,000), a violation of this section is a Class H felony.”). Thus, the allegations and proof carry the same legal signification. *See Simmons*, 57 N.C. App. at 551, 291 S.E.2d at 817-18. Therefore, Defendant has failed to establish he was prejudiced by the alleged variance. *See Juran*, 294 N.C. App. at 87, 901 S.E.2d at 877-78; *Glidewell*, 255 N.C. App. at 113, 804 S.E.2d at 232.

Thus, viewed in the light most favorable to the State, sufficient evidence supports Defendant’s conviction for Attempting to Obtain Property by False Pretenses. Therefore, the trial court properly denied Defendant’s Motion to Dismiss. Consequently, the trial court did not err by entering Judgment against Defendant on the jury verdicts.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error in Defendant’s trial and affirm the Judgment.

NO ERROR.

Judges TYSON and FLOOD concur.

STATE V. HARVELL

Opinion of the Court

Report per Rule 30(e).