NO. COA02-23

NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2002

STATE OF NORTH CAROLINA

v. Alamance County
No. 99 CRS 6490

DEBORAH WILLIAMSON,
Defendant

Appeal by defendant from judgment entered 23 August 2001 by Judge James C. Spencer in Alamance County Superior Court. Heard in the Court of Appeals 18 September 2002.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen M. Waylett, for the State.

James N. Freeman, Jr., for defendant-appellant.

BRYANT, Judge.

Defendant Deborah Williamson was found guilty of obtaining property by false pretenses at the 20 August 2001 criminal session of Alamance County Superior Court with the Honorable James C. Spencer, presiding. Defendant was sentenced to 8-10 months imprisonment, with said sentence being suspended and defendant being placed on supervised probation. Defendant gave written notice of appeal on 27 August 2001.

The State's evidence tended to show the following: On 21 October 1998, Miguel Chavez was arrested on drug charges, and his bond was set at $100,500. He called his wife, Elva Chavez, and

others, asking them to arrange bond for his release. Miguel asked Elva to call Vivian Maltby, who worked as a court translator.

Elva called Vivian the following morning, and Vivian gave Elva the name and number of a bondsman (defendant). Elva asked her son Alex Chavez to call the defendant. Alex reached the defendant's pager. When defendant called back, Alex explained they wanted to bail his father out of jail. Defendant said she did not want to talk over the telephone. She asked them to meet her at the Pan-Pan Diner on Hillandale Road in Durham.

Sometime between lunch and dinner, Alex, his mother, and three sisters drove to the Pan-Pan Diner to meet defendant. While standing in the parking lot, they discussed posting bail for Miguel. Defendant wanted $15,000 for the bond and $2,250 for her fee for a total of $17,250. Alex told the defendant they would call her if they could get the money.

When the family returned home, Alex and Elva called relatives in Florida to try and obtain the $17,250. Later that day, one of Alex's brothers called from Florida and said that he had the money. They agreed to meet in order to exchange the money. Alex, his mother, and three sisters drove to the border of South Carolina and Georgia to pick up the money. The parties met at a gas station.

When they got home early the next morning, Alex and his mother counted the money. They counted $17,250. Elva put the money under her bed and went to sleep.

The next morning, Alex paged the defendant. When she called back, Alex told her they had the money. Alex told defendant his

mother wanted to meet at the sheriff's department. Defendant said she did not want to meet at the sheriff's department because there was a trial going on, with lots of media attention. Defendant asked them to meet her at the Winn-Dixie in Graham after lunch.

Alex and his mother put the money in two bags and drove to the Winn-Dixie. When defendant arrived, she signaled for them to follow her to the back of the lot. Alex and defendant got out of their cars. Alex gave the bags to the defendant, who placed them in the front seat of her car. Alex asked the defendant for a receipt, but the defendant replied that she could not give him a receipt until she bailed his father out of jail.

The Chavez family drove home to wait for Miguel's release. Two hours later, Alex paged defendant. She returned his call and said she was not going to bail out his father until that evening because of all the media at the courthouse. When Alex paged her later that evening, she told him to call back at 1:00 a.m.

Alex called defendant at 1:00 a.m., and defendant told Alex that she had not bailed out his father. Defendant said when she went to the sheriff's department, she was interrogated and that the money had been confiscated by the sheriff's department as drug money. Alex's mother did not believe defendant's story and told Alex to call her back. Alex tried paging defendant several times over the next three days, however, defendant did not return the calls.

The Chavez family raised bail for a second time, and gave the money to a bondsman named Jim Kelly. Kelly gave them a receipt for

the money. Later, Kelly said that because Miguel was on federal detainer, he could not bail him out. Kelly returned the money after being contacted by Mrs. Chavez's attorney.

Elva testified at trial that she had used defendant's services as a bondsman before. As to an unrelated case, Elva testified that she had applied for a court-appointed attorney. She was shown an "Affidavit of Indigency" that she had signed. Allegedly, the affidavit contained incorrect financial information. The charges against Elva in that case were dismissed in 1998.

Larry Reeves, an investigator for the North Carolina Department of Insurance, Special Services Division, testified that he began an investigation of defendant when he got a call on 14 December 1998 from the sheriff's department. Investigator Reeves testified that he found no evidence to support defendant's claim that federal agents or any other law enforcement official had seized the money paid to the defendant by the Chavez family.

Investigator Reeves also testified that defendant had not renewed her license as a surety bondsman, and defendant's surety license had expired on 30 June 1998. Defendant was licensed as a professional bondsman in October 1998. Investigator Reeves testified that in October 1998, defendant had $20,000 on deposit with the Department of Insurance. The required deposit that is acceptable to the Department of Insurance is four times the amount of any bond the bondsman can write. Therefore the maximum amount of bond the defendant could have posted for Miguel was $5,000.

At trial, defendant testified that she never received money

from the Chavez family or that she ever met them at the Pan-Pan Diner or at Winn-Dixie. In addition, several witnesses testified on defendant's behalf.

I.

Defendant presents four arguments on appeal. First, defendant argues that the trial court erred in failing to allow the defendant to cross-examine Elva Chavez concerning her prior inconsistent statements. Specifically, defendant contends that the trial court committed reversible error when it denied defendant's request to question Elva about an Affidavit of Indigency she had signed in April 1998. We disagree.

In general, all relevant evidence is admissible. N.C.G.S. § 8C-1, Rule 402 (2001). N.C.G.S. § 8C-1, Rule 608(b) (2001), governs when evidence of specific instances of bad conduct may be admitted for the purpose of attacking the credibility of a witness. Even if the evidence meets the criteria enumerated in Rule 608, the trial court must determine, in its discretion, and pursuant to N.C.G.S. § 8C-1, Rule 403, that the probative value of the evidence is not substantially outweighed by the risk of unfair prejudice, confusion of issues, or misleading the jury. *State v. Morgan*, 315 N.C. 626, 634, 340 S.E.2d 84, 90 (1986). For purposes of impeachment, a witness, who is not the defendant, may not be asked about a prior arrest or charge not resulting in a conviction. *See State v. Williams*, 279 N.C. 663, 672, 185 S.E.2d 174, 180 (1971). In the instant case, defendant sought to impeach Elva's character for truthfulness by introducing evidence contained in an Affidavit

of Indigency. Defendant contends that information contained in the affidavit indicates her propensity for untruthfulness. Specifically, defendant contends that Elva lied on the affidavit concerning her and Miguel's employment status and other financial matters, and that dishonesty was evidenced by contradicting evidence presented at trial. The trial court, however, was concerned that the affidavit referred to criminal charges that had been dismissed.

During *voir dire*, defense counsel questioned Elva concerning her statements in the affidavit, and subsequently sought the trial court's permission to elicit this information at trial. The transcript reflects in pertinent part:

> COURT: I understand that you're asking about a document--
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> MR. THOMPSON: Yes, sir.
>
> COURT: --which on its face indicates that she has been charged. I mean that's what the document is. It's an affidavit of indigency with her as the defendant with these charges enumerated on it. Charges were subsequently dismissed.
>
> MR. THOMPSON: Yes, sir. Yes, sir. But under oath, she's made statements which she has directly contradicted on the witness stand. She claims to be regularly employed. Her husband was working. She was living here. She owned a car. She had other assets.
>
> COURT: I don't...
>
> MR. THOMPSON: . . . She made statements that were not correct, and that were, either she was lying on the witness stand earlier or she was lying when she made the statements. We think that, the credibility issue should go before the jury.

. . . .

> COURT: Well, I'm not, I'm not certain either, Mr. Thompson, what the relevance is. I don't know that inquiry has been made of as to her financial condition five months before this, this took place. And, and if it has, what the relevance of that would be. Additionally, it seems to me that with respect to, and of course, if she's been convicted of anything, perfectly free to inquire about that, provided it meets, it's within the rules. But this obviously relates to charges against her five months before this, the situation that we're talking about here took place and which charges were subsequently dismissed against her. . . . [I]t also seems to me that even if it is relevant, that it is subject to 403 exclusion on the basis of its probative value being substantially outweighed by the danger of either unfair prejudice or confusion of the issues. And I'm gong to decline to allow it in.

The trial court was obliged to weigh the risk of prejudice against the probative value of the evidence sought. *See State v. Larrimore*, 340 N.C. 119, 150-51, 456 S.E.2d 789, 805-06 (1995). In its discretion, the trial court ruled that such evidence was inadmissible. The trial court considered the relevance of the information contained in the affidavit and the fact that the affidavit contained evidence of prior charges not resulting in convictions, and determined that any probative value of the evidence would be substantially outweighed by the danger of unfair prejudice or confusion of the issues. Defendant failed to show the trial court abused it discretion. The trial court did not err in denying defendant's request to cross-examine Elva about the affidavit. Therefore, this assignment of error is overruled.

II.

Defendant next argues that the trial court erred in denying defendant's motion to exclude and sequester State's witness, Alex Chavez, from the courtroom during the testimony of State's witness, Elva Chavez. We disagree.

Both N.C.G.S. § 8C-1, Rule 615 (2001), and N.C.G.S. § 15A-1225 (2001), provide that at the request of a party, the court may order witnesses excluded so that they cannot hear testimony of other witnesses. Sequestering witnesses serves two purposes: it prevents witnesses from tailoring their testimony to that of an earlier witness; and it aids in the detection of testimony that is less than candid. *State v. Johnson*, 128 N.C. App. 361, 370, 496 S.E.2d 805, 811 (1998). A motion to sequester witnesses, and the orderly conduct of the trial, are in the sound discretion of the trial court, and are not reviewable on appeal absent a showing of an abuse of discretion. *State v. Young*, 312 N.C. 669, 677-78, 325 S.E.2d 181, 186-87 (1985).

Defendant has made no showing of an abuse of discretion on the part of the trial court in either respect. At the time of defendant's request, Alex had already testified, so any risk of Alex tailoring his testimony to mimic Elva's testimony was minimal at best. The trial court stated that it saw no evidence that Alex was "coaching" Elva. Moreover, the trial court stated, "I will direct him as well as anybody else not to signal by hand, mouth, any other way to any witness on the stand at any time."

The orderly conduct of the trial was within the discretion of the trial court and the trial court was not required to remove Alex

from the courtroom based on the defendant's unsupported allegations of misconduct. Defendant has failed to show an abuse of discretion, therefore, this assignment of error is overruled.

III.

Third, defendant argues that the trial court erred in failing to grant defendant's motion to dismiss and motion for directed verdict. Specifically, defendant argues that the State presented insufficient evidence to prove the crime of obtaining property by false pretenses. We disagree.

"In reviewing a motion to dismiss, 'the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant[] being the perpetrator of the offense.'" *State v. Stancil*, 146 N.C. App. 234, 244, 552 S.E.2d 212, 218 (2001), *aff'd as modified*, 355 N.C. 266, 559 S.E.2d 788 (2002). When reviewing challenges to the sufficiency of the evidence, the evidence must be viewed in the light most favorable to the State, with the State receiving the benefit of all reasonable inferences to be drawn from the evidence. *State v. Compton*, 90 N.C. App. 101, 103, 367 S.E.2d 353, 355 (1988).

The standard of review of the denial of a motion for directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury. *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991). When determining the correctness

of the denial of a motion for directed verdict the question is whether there is sufficient evidence to sustain a jury verdict in the non-moving party's favor, or to present a question for the jury. *Davis*, 330 N.C. at 323, 411 S.E.2d at 138.

To convict defendant of the charge of obtaining property by false pretenses under N.C.G.S. § 14-100, the State was required to show that: (1) defendant made a false representation of a fact or future event; (2) that was calculated and intended to deceive; (3) and did in fact deceive another person; and (4) defendant thereby obtained something of value from that other person. N.C.G.S. § 14-100 (2001); *Compton*, 90 N.C. App. at 103, 367 S.E.2d at 354.

Defendant argues that there was insufficient evidence to establish the "intent to deceive" element. Intent to deceive is seldom proven by direct evidence, and must ordinarily be proven by circumstances from which it may be inferred. *State v. Bennett*, 84 N.C. App. 689, 691, 353 S.E.2d 690, 691-92 (1987).

The jury could reasonably infer that defendant had never intended to post bond for Miguel Chavez when she told Alex and Elva that she would post bond for a payment of $17,250. Miguel Chavez's bond was set at $100,500. As of October 1998, however, defendant could not post bond in an amount greater than $5,000.

In addition, at defendant's request, defendant's interactions with Alex and Elva took place in informal settings, rather than at an office or at the courthouse. She was unwilling to tell them over the phone how much money she needed to post the bond. Later, defendant rejected Elva's suggestion that they meet at the

sheriff's department to give defendant the money. Defendant told them to meet her at the Winn-Dixie in Graham. When defendant arrived at Winn-Dixie, she motioned for them to follow her to a more remote location behind the store. Defendant refused to provide a receipt for the cash when she was requested to do so.

Defendant provided an elaborate explanation for her failure to post bond and the loss of the money. Investigator Reeves spoke with numerous law enforcement officials and found no evidence to support defendant's claim that the money had been confiscated by law enforcement officials. Moreover, Vivian Maltby testified that defendant admitted to her that she had received the money, and was not going to give it back.

There is sufficient evidence of "intent to deceive" to withstand a motion to dismiss and a motion for directed verdict. This assignment of error is overruled.

IV.

Last, defendant argues that the trial court erred in not sustaining defendant's objection to the improper closing argument by the prosecution. Specifically, defendant argues that the trial court allowed the prosecution to argue facts not in evidence in his closing statement. We disagree.

Counsel are allowed, during closing argument, to argue fully all of the facts in evidence as well as all reasonable inferences which may be drawn from those facts. *State v. Jarrett*, 137 N.C. App. 256, 260, 527 S.E.2d 693, 696, *review denied*, 352 N.C. 152, 544 S.E.2d 233 (2000). The scope of the argument, and the latitude

to be given counsel, is within the control and discretion of the trial court. *State v. Meyer*, 353 N.C. 92, 113, 540 S.E.2d 1, 13 (2000), *cert. denied*, ___ U.S. ___, 151 L. Ed. 2d 54 (2001). Even if the comment goes beyond the scope of proper argument, the trial court's instructions to the jury can remedy any error potentially resulting from the comment. *State v. Shope*, 128 N.C. App. 611, 614, 495 S.E.2d 409, 412 (1998).

The portion of the prosecution's closing argument to which defendant objects, reads in pertinent part:

> How do we know she had the intent to defraud them at that point? Because Ms. Williamson could not have gone a hundred thousand dollars. On August 1, her insurance company, her ability to do a surety bond through an insurance company, which would have allowed her to do that, had not been renewed because the insurance company wouldn't do business with her anymore.

Defendant objected to that portion of the closing argument, and the trial court instructed the jury to "take their recollection of the evidence." The prosecution continued its closing argument and stated:

> Okay. Ms. Williamson testified here on the stand when I asked her that the insurance company wasn't doing business with [her] anymore. You take your recollection as you recall it. She couldn't do it under her professional bondsman license because she had $20,000 on deposit, and all she could write was $5000. So she told them she would get him out, and she knew that she couldn't do it.

Even if the State's comment, "the insurance company wouldn't do business with her anymore" could be deemed to be outside the scope of permissible argument, any possible error was cured by the

trial court's contemporaneous and subsequent final instructions to the jury. Specifically, upon objection to the State's argument the trial court instructed the jury to take their recollection of the evidence. Thereafter, in its final charge, the trial court instructed the jury that it was their job to determine the facts based on the evidence presented; and if their recollection of the evidence differed from the prosecution or defense attorney's recollection, [that] they were to rely solely on their recollection of the facts.

The trial court did not err when it declined to sustain defendant's objection during State's closing argument. This assignment of error is overruled.

NO ERROR.

Judges McCULLOUGH and TYSON concur.

Report per Rule 30(e).