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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1092

Filed: 1 August 2017

Wake County, No. 14CRS222735-37

STATE OF NORTH CAROLINA

v.

MARC FELLNER, Defendant.

Appeal by Defendant from judgments entered 1 February 2016 by Judge Henry W. Hight, Jr., in Wake County District Court. Heard in the Court of Appeals 4 May 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Ryan F. Haigh, for the State.

Meghan Adelle Jones for the Defendant.

DILLON, Judge.

Marc Fellner (“Defendant”) appeals from judgments entered upon jury verdicts finding him guilty of obtaining property by false pretenses. We find no error.

I. Background

Defendant was indicted on three counts of obtaining property by false pretenses. The indictments alleged that Defendant overstated the amount of State

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income tax that had been withheld from his paychecks for the years 2011, 2012 and 2013 and that these overstatements resulted in Defendant receiving “a larger refund than he was entitled to receive from the North Carolina Department of Revenue.” The indictments indicated the amount of Defendant’s overstatements for each of the three years, which amounted to over \$25,000.00 in the aggregate.

The evidence at trial tended to show as follows: Defendant prepared his own tax returns for the three years in question, using TurboTax, a do-it-yourself tax preparation program which helps individuals complete State and Federal income tax forms. TurboTax relies on customer-inputted data in order to calculate tax refunds. Defendant erred in inputting data by overstating the amount his employers withheld from his paycheck. As a result, Defendant received a larger tax refund than he otherwise would have received.

The North Carolina Department of Revenue (“DOR”) discovered the discrepancies on Defendant’s tax returns when Defendant’s 2013 return was flagged because he stated that he had approximately \$11,000 in State withholding tax when his total wages were \$35,000. After pulling Defendant’s prior returns, the auditor discovered further inconsistencies and referred Defendant to the criminal investigation unit of the DOR.

After a jury trial, Defendant was found guilty of three counts of obtaining property by false pretenses. Defendant appealed.¹

II. Analysis

Defendant makes two arguments on appeal. First, Defendant argues that the indictments were jurisdictionally defective. Second, Defendant argues that the trial court erred in denying his motions to dismiss made during the trial. We address each argument in turn.

A. Indictments

Defendant first argues that the trial court lacked jurisdiction to convict him of obtaining property by false pretenses because of errors in each indictment. Specifically, Defendant contends that the indictments were invalid because they alleged that Defendant obtained “a refund,” which Defendant now argues in his brief is not sufficient to allege the crime of obtaining property by false pretenses because a “refund” is “by definition something to which one is entitled.” We disagree.

We review the sufficiency of an indictment *de novo*. *State v. Sturdivant*, 304 N.C. 293, 307-11, 283 S.E.2d 719, 729-31 (1981). Where an indictment is alleged to be invalid, it may be challenged at any time, notwithstanding a defendant’s failure to contest its validity in the trial court. *State v. Braxton*, 352 N.C. 158, 173, 531 S.E.2d

¹ Defendant has filed a petition for writ of *certiorari* in order to remedy a defect in his notice of appeal and his failure to timely request trial transcripts. In our discretion, pursuant to appellate Rule 21, we hereby grant Defendant’s petition for writ of *certiorari* to consider the merits of Defendant’s appeal. N.C. R. App. P. 21(a)(1).

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428, 436-37 (2000). Generally, an indictment is constitutionally sufficient if it “apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense.” *State v. Coker*, 312 N.C. 432, 434, 323 S.E.2d 343, 346 (1984). An indictment is sufficient in form if it expresses the charge in a “plain, intelligible and explicit manner[,]” N.C. Gen. Stat. § 15-153, and the charge is “clearly set forth so that a person of common understanding may know what is intended.” *Coker*, 312 N.C. at 435, 323 S.E.2d at 346.

We are unpersuaded by Defendant’s argument that the indictment’s use of the word “refund” was insufficient because he asserts that the “refund” is something to which he was entitled. Defendant’s argument ignores the additional language in the indictments which further defines the “refund” Defendant obtained as “*a larger refund than he was entitled to receive* from the North Carolina Department of Revenue.” This additional language clearly apprised Defendant that the State was alleging that Defendant obtained property that he was not entitled to, notwithstanding the State’s use of the word “refund.” The indictments further alleged the specific amounts of “U.S. Currency” that Defendant obtained by his representations, which our Supreme Court has held is sufficient to allege the crime of obtaining property by false pretenses. *See State v. Smith*, 219 N.C. 400, 14 S.E.2d 36 (1941); *State v. Reese*, 83 N.C. 637, 640 (1880).

B. Motions to Dismiss

Defendant's second argument on appeal relates to his motions to dismiss the charges at the close of the State's evidence and the close of all evidence. Specifically, Defendant contends that the State failed to show that Defendant acted with the intent to deceive and failed to show that Defendant made the representations alleged in the indictments. We disagree.

We review the denial of a motion to dismiss for insufficiency of the evidence *de novo*. *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982). In order to prevail on a claim of insufficiency of the evidence based on a variance between the indictment and the evidence, a defendant must show a fatal variance between the offense charged and the proof as to "[t]he gist of the offense." *State v. Pickens*, 346 N.C. 628, 646, 488 S.E.2d 162, 172 (1997).

The crime of obtaining property by false pretenses requires (1) a false representation of fact, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which the defendant obtains or attempts to obtain anything of value from another person. *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980).

Here, the false representation alleged in the indictments was that Defendant claimed he "had paid North Carolina Withholding Taxes" in a higher amount than had actually been withheld from his paychecks. The false representation at issue in

this case is Defendant's entry of a higher withholding amount into TurboTax than was actually reported as withheld on his W2 forms. Defendant's W2 forms were entered into evidence via a stipulation agreement. In addition, an employee of the North Carolina DOR testified to the actual dollar amount of State withholding taxes that was reported on Defendant's State-issued W2 forms, comparing the amount with the amounts reported by Defendant via TurboTax. For example, in 2012, Defendant's W2s stated that the total amount withheld from Defendant's paychecks was \$1,279.72; however, via TurboTax, Defendant reported that the total amount withheld was \$9,279.72. The DOR employee also testified that Defendant's entry of higher amounts of withholding taxes resulted in an increase in the amount of his income tax refund.

We conclude that this evidence is sufficient to establish that Defendant made a false representation regarding the amount of income tax withheld from his paychecks in 2011, 2012, and 2013. In addition, we conclude that the language used in the indictment to refer to "income tax" and "State withholding tax" does not affect the State's burden of proof as to the "gist of the offense." *See Pickens*, 346 N.C. at 646, 488 S.E.2d at 172.

Defendant also argues that the State failed to show that he acted with intent to deceive when he made these false representations. While we note that Defendant is correct in his assertion that "intent is seldom provable by direct evidence . . . [and]

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must ordinarily be proved by circumstances from which it may be inferred,” *State v. Braswell*, 225 N.C. App. 734, 739-40, 738 S.E.2d 229, 233 (2013), we conclude that in this case, the State presented sufficient evidence from which a jury could conclude that Defendant intended to deceive the State of North Carolina by making false representations of his income tax withholdings on his tax returns. *See id.* at 740, 738 S.E.2d at 233 (“In determining the absence or presence of intent, the jury may consider the acts and *conduct* of the defendant and the general circumstances existing at the time of the alleged commission of the offense charged.”); *see also State v. Ferguson*, 261 N.C. 558, 561, 135 S.E.2d 626, 628 (1964) (“[I]ntent must be found by the jury as a fact from the evidence.”).

The State presented evidence which tended to rebut Defendant’s testimony that he made errors on his tax returns because he was busy and periodically stopped and started the process. The State presented evidence that Defendant made these “errors” for at least three consecutive years, that the withholding amounts were consistently larger than the actual withholdings on Defendant’s W2s, and that all the entries which had no bearing on the amount of Defendant’s tax refund were consistently correct.

Based on this evidence and the other evidence in the record, we conclude that the trial court correctly denied Defendant’s motions to dismiss and that Defendant received a fair trial, free from error.

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NO ERROR.

Judges DIETZ and TYSON concur.

Report per Rule 30(e).