Rel: January 11, 2019

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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2018-2019

CR-17-0873

Kamecia Latrina Thomas

v.

State of Alabama

**Appeal from Jefferson Circuit Court (Bessemer Division)
(CC-17-861)**

KELLUM, Judge.

Kamecia Latrina Thomas was convicted of theft of lost property in the first degree, a violation of § 13A-8-7, Ala. Code 1975. She was sentenced to two years' imprisonment; the

sentence was suspended; and she was placed on five years' probation.

The evidence adduced at trial indicated the following. Between 2003 and 2014, Thomas was employed by the Bessemer Board of Education (hereinafter "the Board") as a licensed substitute teacher in the Bessemer school system. Thomas's substitute-teacher license expired on June 30, 2014. Testimony indicated that the Board has two types of employees -- regular full-time employees and substitutes. Regular full-time employees receive paychecks in roughly the same amount each month; substitutes are paid only for the days they work, so their paychecks differ depending on how many days they work in a month. All employees, however, including full-time employees, are paid based on time sheets that are submitted to the Board.[1] Evidence indicated that substitute teachers are paid $60 for every day they work unless they work 20 consecutive school days in the same classroom, in which case, they are paid $125 per day.

[1]Full-time employees also submit time sheets because if they have no sick or vacation days and are absent from work, their pay is reduced.

Willie Davis, the chief financial officer for the Board at the time of the events at issue here,[2] and Pat Stewart, the chief financial officer for the Board at the time of trial and former supervisor of business affairs for the Board, both testified about the discovery and investigation of what were determined to be erroneous payments the Board made to Thomas between 2010 and 2014. In October 2014, as the Board was reconciling its finances for the fiscal year that ended September 30, 2014, the payroll clerk, who had been employed by the Board for only a few months, discovered that "an employee was being paid that wasn't there." (R. 140.) When reconciling the finances, the Board must make sure that all full-time employees are "assigned to a salary schedule." (R. 240.) Thomas, although a substitute employee, was listed on the payroll for regular full-time employees (she was listed as a "permanent" substitute), and she had been regularly receiving payments, mostly via direct deposit to her bank account but some via written check, from the Board, but she was not assigned to a salary schedule. (R. 200.) This raised a "red flag" for those reconciling the Board's finances. (R.

[2]At the time of trial, Davis was working for the City of Huntsville School System.

202.) Davis and Stewart then conducted an investigation to determine whether Thomas was a full-time employee of the Board and whether the payments that had been made to her were proper.

During the investigation, it was discovered that Thomas had first been placed on the payroll for full-time employees in 2010 and that she had regularly been receiving erroneous payments since that time, although the error was not discovered until 2014. Davis posited that the error had not been discovered earlier because the former payroll clerk would remove Thomas's name from the full-time payroll at the end of the fiscal year and then, after the finances for that fiscal year had been reconciled, the payroll clerk would put Thomas's name back on the full-time payroll. Davis spoke with the principals of some of the schools where Thomas had supposedly worked as a substitute. One principal indicated that Thomas had never been a substitute teacher there, and another indicated that Thomas had at one time been a substitute teacher at the school, but that she had not been a substitute in several years. According to Davis, he "verif[ied] with several people that [Thomas] was not an employee of the

system" (R. 146), and he determined that "she was paid when she didn't actually work for us." (R. 149.)

Testimony indicated that between September 2011 and September 2013, Thomas was erroneously paid $14,949.49, and that between December 2013 and September 2014, Thomas was erroneously paid $11,310. Between May 2010 and September 2014, Thomas was erroneously paid a total of $46,779.49 in gross pay. Some of the payments to Thomas were made during the summer months of 2012 and 2013, during which time Thomas would not have been working, even as a substitute teacher, because, according to Davis, when a teacher is absent from summer school, the Board does not hire substitutes but uses other summer-school teachers to fill in. In addition, no time sheets were found relating to Thomas that would have supported the payments that had been made to her.

Davis discussed the issue with the personnel department and learned that Thomas's substitute-teacher license had expired and that the copy of her driver's license the Board had on file had also expired. Thomas was then called to the Board's office under the guise of updating her file with her current driver's license. After she updated her file, she was

escorted to Davis's office, where Davis spoke with her about the erroneous payments. When Davis explained to Thomas that she had been paid in error, Thomas acknowledged that she knew she had been paid by the Board when she did not work, and said that "she thought it was a gift from God." (R. 170.) Davis said that he asked Thomas if she had colluded with the former payroll clerk to obtain the payments and Thomas denied having done so. According to Davis, Thomas said she was sorry and that she was responsible for raising her nieces and nephews, and she mentioned making arrangements to pay back the money, but Davis told Thomas that he was not authorized to make any agreement with her and that he had to report the erroneous payments to the Board. Davis testified that, although Thomas later contacted him again and asked to speak to him about the situation "in private," when he informed her that he was unwilling to meet with her without another person present as a witness, he never heard from Thomas again. (R. 172.)

The State introduced into evidence records from the Board that showed the payments that had been made to Thomas between 2010 and 2014, as well as payments that had been made to Thomas before 2010. Those records indicate that, before 2010,

Thomas was paid sporadically on average a net amount between $300 and $400 as a substitute teacher, but that after 2010, Thomas was paid on average a net amount of approximately $1,000 on a regular, almost monthly, basis. The last erroneous payment Thomas received was $1,080 on September 30, 2014. The State also introduced into evidence the W-2 tax forms for 2012 and 2013 that the Board had generated for Thomas, and Thomas's bank statements reflecting direct deposits from the Board between 2010 and 2014.

In her defense, Thomas called her twin cousins, Kiara Thomas and Tiara Thomas to testify. Kiara and Tiara both attended Bessemer High School and graduated in 2014. Tiara testified that during the 2011-12 school year, Thomas was a substitute teacher in one of her classes "for a day or so." (R. 277.) Both Kiara and Tiara also testified that during the 2013-14 school year, they saw Thomas at school one day substituting for a science teacher.

After both sides had rested and the trial court had instructed the jury on the applicable principles of law, the jury found Thomas guilty of theft of lost property in the

first degree as charged in the indictment.[3] This appeal followed.

I.

Thomas contends that the trial court erred in denying her motion to dismiss the indictment on the ground that her prosecution was barred by the statute of limitations.

The indictment was returned on February 3, 2017, and charged, in relevant part:

> "KAMECIA LATRINA THOMAS, whose name is to the Grand Jury otherwise unknown, did on or between MAY 25, 2010, to SEPTEMBER 30, 2014, actively obtain or exert control over U.S. CURRENCY, of the lawful currency of the United States of America, a more particular denomination and description of which is unknown to the Grand Jury, in an amount in excess of two thousand five hundred dollars, the property of BESSEMER BOARD OF EDUCATION, which the said KAMECIA LATRINA THOMAS knew to have been lost or mislaid, or to have been delivered under a mistake as to the identity of the recipient or as to the nature or the amount of the property, and with the intent to deprive BESSEMER BOARD OF EDUCATION permanently of said property, the KAMECIA LATRINA THOMAS did fail to take reasonable measures to discover and notify the owner.

(C. 6; capitalization in original.) In response to Thomas's motion to dismiss the indictment on statute-of-limitations grounds, the State moved to amend the indictment to change the

[3]Thomas was also indicted for theft of property in the first degree; the jury acquitted her of that charge.

date of the commencement of the crime from May 25, 2010, to February 3, 2012, so that all the transactions charged in the indictment fell within the five-year statute of limitations for felonies in § 15-3-1, Ala. Code 1975. See Act No. 2014-348, Ala. Acts 2014 (increasing the statute of limitations for felonies from three years after the commission of the offense to five years effective July 1, 2014). The trial court granted the State's motion to amend the indictment and denied Thomas's motion to dismiss.

On appeal, Thomas argues that theft of lost property is not a continuing offense and that the former three-year statute of limitations, not the current five-year statute of limitations, is applicable to her case. She also argues that "the majority of the period of time set forth in the ... [i]ndictment encompassed allegations occurring outside the statute of limitations" and that the State "was barred from issuing the [i]ndictment at issue to events occurring" outside the three-year statute of limitations. (Thomas's brief, pp. 16 and 19.) We find it unnecessary to address whether the former three-year or the current five-year statute of limitations is applicable to Thomas because, even if Thomas is

correct and the former three-year statute of limitations is applicable, we conclude, contrary to Thomas's contention, that theft of lost property is a continuing offense and that the indictment was timely returned on February 3, 2017, within three years of the last transaction on September 30, 2014.

> "It is settled that an offense may be of a continuing nature. Where the acts, when consolidated, constitute but one offense, that crime should be the one with which the accused is charged. Pendergast v. United States, 317 U.S. 412, 63 S.Ct. 268, 87 L.Ed. 368 (1943); Troup v. State, 51 Okl. Cr. 438, 2 P.2d 591 (1931); and 35 C.J.S. False Pretenses § 22. Similarly, if several acts form but one element of an offense, the offense is not complete until the last of such acts has been performed. United States v. Ashdown, 509 F.2d 793 (5th Cir. 1975); United States v. Andreas, 458 F.2d 491 (8th Cir. 1972); Carroll v. United States, 326 F.2d 72 (9th Cir. 1963); and 22 C.J.S. Criminal Law § 227(1). Cf., Johnson v. State, 49 Ala. App. 389, 272 So. 2d 597 (1973); and Hendrix v. State, 17 Ala. App. 116, 82 So. 564 (1919)."

Griffin v. State, 352 So. 2d 847, 850 (Ala. 1977).

> "'In contrast to the instantaneous nature of most crimes, a continuing offense is one which consists of a course of conduct enduring over an extended period of time. Note, Statute of Limitations in Criminal Law: A Penetrable Barrier To Prosecution, 102 Pa.L.Rev. 630, 641-642 (1954).' John v. State, 96 Wis. 2d 183, 188, 291 N.W.2d 502, 505 (1980). 'Even if the initial unlawful act may itself embody all of the elements of the crime, the criminal limitations period commences from the most recent act.' 96 Wis. 2d at 188, 291 N.W.2d at 505.

> "Because the continuing offense concept, by extending limitations periods, conflicts with the policies and principles on which limitations periods are based, the concept 'should be applied in only limited circumstances,' Toussie v. United States, 397 U.S. 112, 115, 90 S.Ct. 858, 860, 25 L.Ed.2d 156 (1970) (refusal to register for the draft not a continuing offense), such as when required by the 'explicit language of the substantive criminal statute,' id. at 115, 90 S.Ct. at 860, or by the inherent 'nature of the crime involved.' Id."

Alabama State Bar v. Chandler, 611 So. 2d 1046, 1048 (Ala. 1992).

Section 13A-8-6, Ala. Code 1975, provides:

> "A person commits the crime of theft of lost property if he actively obtains or exerts control over the property of another which he knows to have been lost or mislaid, or to have been delivered under a mistake as to the identity of the recipient or as to the nature or the amount of the property, and with intent to deprive the owner permanently of it, he fails to take reasonable measures to discover and notify the owner."

Although § 13A-8-6 does not expressly state that theft of lost property is a continuing offense, the nature of the crime in this case leads us to conclude that it was a continuing offense. The evidence indicated that between February 3, 2012, and September 30, 2014, the Board mistakenly made repeated payments to Thomas for work Thomas never performed; that Thomas was aware of each of the payments; and that Thomas

took no steps to notify the Board of any of the erroneous payments. In Griffin, supra, the Alabama Supreme Court held that the former offense of obtaining property by false pretenses, when it consisted of repeated false representations and repeated acquisitions of money, was a continuing offense, not completed until the last such misrepresentation and acquisition had been made. See also State v. Steele, 502 So. 2d 874, 874-75 (Ala. Crim. App. 1987). Compare Ex parte Rosborough, 909 So. 3d 772, 774-76 (Ala. 2004) (holding that the crime of theft by deception, substantially similar to the former crime of obtaining property by false pretenses, was not a continuing offense when it consisted of a single misrepresentation that led to a single acquisition of money). In this case, as in Griffin, there were repeated erroneous payments to Thomas over the course of several years; therefore, the offense with which Thomas was charged was a continuing offense. Cf. Speigner v. State, 663 So. 2d 1024, 1026 (Ala. Crim. App. 1994) (noting that a series of thefts occurring over the course of three years would be a continuous offense "if the appellant [had been] charged with one count of theft that encompassed her conduct" but because the appellant

had been charged with 51 separate counts of theft, "the continuous transaction theory ... does not apply").

Because the offense with which Thomas was charged was a continuing offense, the statute of limitations did not begin to run until the last erroneous payment was made on September 30, 2014, less than three years before Thomas was indicted in February 2017. "Moreover, it is unimportant that the first payment[s], if taken alone, would be beyond the statutory period; and this for the reason that where the offense is continuous, the statute of limitations does not apply where some portion of the crime is within the period, although another portion thereof is not." Griffin, 352 So. 2d at 850-51. Therefore, the trial court properly denied Thomas's motion to dismiss the indictment.

II.

Thomas also contends that the trial court erred in admitting into evidence State's Exhibit 7 -- several of her bank statements from Regions Bank -- because, she says, those statements were not properly authenticated and constituted inadmissible hearsay.

The record reflects that the statements were introduced into evidence by the State during the testimony of Willie Davis. The prosecutor asked Davis to describe State's Exhibit 7, and Davis said that the exhibit appeared to be Thomas's bank statements from Regions Bank. The prosecutor then asked Davis to read a portion of the exhibit and Thomas objected, arguing that Davis had "indicated that he did not generate the document. So apparently he has no personal knowledge of it." (R. 160.) The trial court sustained the objection and, after an off-the-record discussion, again sustained the objection. The prosecutor then asked Davis a few questions about the Board's records, which had already been introduced into evidence, after which the prosecutor offered State's Exhibit 7 into evidence. Thomas again objected, but the trial court overruled the objection, stating: "The exhibits in question were subpoenaed in open -- May -- in open court on October 24th, 2016, by Judge Carpenter, so therefore, they have been authenticated and admitted. So State's Exhibit 7 is admitted." (R. 163.) Thomas argues that the bank statements were not properly authenticated because, she says, "the witness testifying to the authentication ha[d] no personal

knowledge of their making and testifie[d] to hav[ing] never seen the statements prior to his testimony at trial[; therefore,] it cannot be said that the [b]ank [s]tatements were properly identified or authenticated." (Thomas's brief, p. 13.) However, contrary to Thomas's apparent belief, a witness with personal knowledge is not the only method by which evidence can be authenticated.

Rule 901(a), Ala. R. Evid., states that "authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(b), Ala. R. Evid., provides a nonexhaustive list of ways to properly authenticate evidence. For example, pursuant to Rule 901(b)(1), evidence may be authenticated by testimony from a witness with knowledge "that a matter is what it is claimed to be." Additionally, however, pursuant to Rule 901(b)(4), evidence may be authenticated by "[d]istinctive [c]haracteristics and the [l]ike," such as "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances."

For example, in Municipal Workers Compensation Fund, Inc. v. Morgan Keegan & Co., 190 So. 3d 895, 913-14 (Ala. 2015), the Alabama Supreme Court held that "materials printed from various Web sites" were properly authenticated under Rule 901(b)(4) where the content of the materials was "highly technical" and its accuracy not challenged or disputed. In Royal Insurance Co. of America v. Crowne Investments, Inc., 903 So. 2d 802, 809 (Ala. 2004), the Alabama Supreme Court held that an insurance policy had been properly authenticated under Rule 901(b)(4) where the policy named the insurer and the insured and included the policy number, among other things, all of which matched the insured's description of the policy in his complaint. And in Thomas v. State, 824 So. 2d 1, 62-64 (Ala. Crim. App. 1999), overruled on other grounds by Ex parte Carter, 889 So. 2d 528 (Ala. 2004), this Court held that a fingerprint card had been properly authenticated under Rule 901(b)(4) where the card contained the subject's date of birth, Social Security number, height, eye color, sex, and race, all of which matched the defendant's characteristics as found on other documents, such as the presentence report.

In this case, the bank statements contain distinctive characteristics that, when considered in light of the circumstances, support a finding that they were what the State claimed they were. The statements contain Thomas's name and address. The name and address on the bank statements are the same as those on Thomas's W-2 tax forms, which were also introduced into evidence. The bank statements also show deposits from the Board on dates and in amounts that match the records from the Board reflecting the payments that had been made to Thomas between 2010 and 2014. In addition, Thomas has not challenged or disputed the accuracy of the content of the bank statements. "The evidence establishing authenticity ... 'does not have to be conclusive or overwhelming; rather, it must be strong enough for the question to go to the jury.' Advisory Committee's Notes, Rule 901(a), Ala. R. Evid." Royal Ins. Co. of America, 903 So. 2d at 809. We conclude that the bank statements were properly authenticated under Rule 901(b)(4) and, therefore, were properly admitted into evidence.[4]

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[4]Although this was not the reason the trial court admitted the bank statements, we note that "[a] trial court's judgment, if correct, should be affirmed even if the court has given a wrong reason in support of its judgment." Ex parte City of

Thomas also argues that the bank statements were inadmissible hearsay because, she says, "there was simply no testimony from any witness with knowledge as to the making of the Region's Bank [s]tatements, whether the same w[ere] made in the regular course of business, or the methodology used to produce the [s]tatements pursuant to the business-records-exception to the hearsay rule." (Thomas's brief, p. 13-14.) However, this argument was not properly preserved for review. As explained above, Thomas objected to the statements on the ground that Davis had "indicated that he did not generate the document. So apparently he has no personal knowledge of it." (R. 160.) At no point, however, did Thomas object to the statements on hearsay grounds. "The statement of specific grounds of objection waives all grounds not specified, and the trial court will not be put in error on grounds not assigned at trial." Ex parte Frith, 526 So. 2d 880, 882 (Ala. 1987). "A defendant is bound by the grounds of objection stated at trial and may not expand those grounds on appeal." Griffin v. State, 591 So. 2d 547, 550 (Ala. Crim. App. 1991). Because Thomas's sole objection to the bank statements at trial was on

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Fairhope, 739 So. 2d 35, 39 (Ala. 1999).

authentication grounds, she is bound by that objection and may not now argue on appeal that the statements were hearsay.

III.

Thomas also contends that the evidence was insufficient to sustain her conviction because, she says, the State failed to prove that she actively obtained or exerted control over the Board's property. Specifically, she argues that, to prove that she actively obtained or exerted control over the Board's property as required by § 13A-8-6, Ala. Code 1975, the State was required to "prove that [she] 'actively' caused the Bessemer Board of Education to voluntarily place monies into her bank account." (Thomas's brief, pp. 9-10; emphasis added.) According to Thomas, the State failed to prove that she caused the Board to make the payments to her and that, at most, her conduct was passive. This issue was not properly preserved for review.

At the close of the State's case, Thomas moved to dismiss the theft-of-lost-property charge as follows:

> "As it relates to CC-17-681 where the defendant is charged with basically being the recipient of lost property, mislaid property, there has been no testimony submitted by the prosecution to indicate that the property was lost, mislaid or anything in

> that nature. So for that reason, the charge is due to be dismissed."

(R. 259.) The trial court denied the motion, stating:

> "Also, in Case Number CC 17 -- the Court denies the motion because I think there's a -- we say theft of lost property in the first degree, but it's almost like a misnomer because it doesn't require that the property be lost, and the only elements that have to be shown is that they commit the crime if they actively obtain or reserve [sic] control over the property of another, which he knows to have been delivered under a mistake as to the identity of the recipient or as to the nature of the amount of the property.
>
> "And so based upon that, there is sufficient evidence that has been produced by the State of Alabama for a jury to consider whether the moneys were mistakenly put into her account and whether she should have known of that. And so that's why the Court grants -- denies that motion because there is sufficient evidence for a jury to consider that. That's a question for fact for them."

(R. 264-65.) Thomas renewed her motion at the close of all the evidence, and the trial court again denied the motion. Thomas did not file a motion for a new trial.

As noted in Part II of this opinion, "[t]he statement of specific grounds of objection waives all grounds not specified, and the trial court will not be put in error on grounds not assigned at trial." Ex parte Frith, 526 So. 2d 880, 882 (Ala. 1987). "A defendant is bound by the grounds of

objection stated at trial and may not expand those grounds on appeal." Griffin v. State, 591 So. 2d 547, 550 (Ala. Crim. App. 1991). In addition, "a defendant who states specific grounds in his motion for a judgment for acquittal waives all grounds not stated." Ex parte Hall, 843 So. 2d 746, 748 (Ala. 2002). See also R.K.D. v. State, 712 So. 2d 754, 757 (Ala. Crim. App. 1997) ("[W]here a defendant states specific grounds in a motion for a judgment of acquittal, the defendant is bound by those grounds and cannot raise new or different grounds on appeal."). Thomas's sole argument to the trial court was that the State had failed to prove that the property was lost or mislaid. Therefore, she is bound by that argument and cannot now argue for the first time on appeal that the State failed to prove that she actively obtained or exerted control over the Board's property.

In her reply brief, relying on Ex parte Hall, supra, Thomas argues that she properly preserved her argument for review because, she says, her objection at trial was to the sufficiency of the evidence as a whole and the trial court's statement in denying the motion that one of the elements of the crime was that Thomas "actively obtain or reserve [sic]

control over the property of another" establishes that the trial court understood that she was challenging the sufficiency of the evidence generally, and not just one specific element of the crime. We disagree.

In Ex parte Hall, the defendant moved for a judgment of acquittal on multiple grounds, including the general ground that "'insufficient evidence has been presented to support a finding that the defendant is guilty beyond a reasonable doubt.'" 843 So. 2d at 747. The Alabama Supreme Court held that the defendant's general objection to the sufficiency of the evidence was sufficient to preserve for review his claim on appeal that the State had failed to introduce into evidence a copy of the municipal ordinance he was charged with violating, even though he had not raised that specific claim in the trial court. The Court relied largely on Ex parte Maxwell, 439 So. 2d 715, 717 (Ala. 1983), in which it had held that a general objection to the sufficiency of the evidence, such as that the State failed to establish a prima facie case, is sufficient to preserve for review a more specific challenge on appeal. However, this Court has recognized that Maxwell and its progeny do not "apply to cases in which a defendant's

motion for judgment of acquittal states very specific grounds, 'none of which can be construed as attacking each and every element' of the offense charged." Sankey v. State, 568 So. 2d 366, 367 (Ala. Crim. App. 1990) (quoting Hanson v. City of Trussville, 539 So. 2d 1082, 1084 (Ala. Crim. App. 1988)).

In this case, unlike Ex parte Hall and Ex parte Maxwell, Thomas did not make a general objection to the sufficiency of the evidence. She did not argue that the State had failed to establish a prima facie case, that the State had failed to satisfy its burden of proof, that the evidence was insufficient, or any other similarly general argument. Rather, Thomas argued very specifically, and to the exclusion of all other arguments, that the State had failed to prove that the property had been lost or mislaid. Moreover, the fact that the trial court, when denying Thomas's motion, listed the elements of the crime of theft of lost property does not, as Thomas argues, establish that the trial court was on notice that she was challenging the sufficiency of the evidence generally as opposed to the specific element that the property was lost or mislaid. Indeed, after listing the elements of the crime, the trial court specifically stated

that it was denying Thomas's motion because "there is sufficient evidence that has been produced by the State of Alabama for a jury to consider whether the moneys were mistakenly put into her account and whether she should have known of that." (R. 265.) Therefore, Thomas's specific argument in the trial court that the State failed to prove that the property was lost or mislaid did not preserve for review Thomas's argument on appeal that the State failed to prove that she actively obtained or exerted control over the property.

Moreover, even if this issue had been preserved for review, it is meritless. Nothing in § 13A-8-6 requires the State to prove, as Thomas argues, that an accused caused the property to be lost, mislaid, or delivered by mistake. Rather, the statute requires that the accused actively obtain or exert control over property that was lost, mislaid, or delivered by mistake. Section 13A-8-1(8), Ala. Code 1975, provides:

> "OBTAINS OR EXERTS CONTROL or OBTAINS OR EXERTS UNAUTHORIZED CONTROL over property includes, but is not necessarily limited to, the taking, carrying away, or the sale, conveyance, or transfer of title to, or interest in, or possession of, property, and includes but is not necessarily limited to conduct

> heretofore defined or known as common law larceny by trespassory taking, common law larceny by trick, larceny by conversion, embezzlement, extortion, or obtaining property by false pretenses."

(Capitalization in original). Merriam-Webster's Collegiate Dictionary 13 (11th ed. 2003), defines "active" as "characterized by action rather than by contemplation or speculation."

In this case, the State presented ample evidence that Thomas actively exerted control over the Board's property. Specifically, Thomas's bank records reflect that she spent that money once it was deposited in her bank account. By spending the money, she actively exerted control over it. Therefore, even if this issue had been preserved for review, Thomas would be due no relief.

IV.

Finally, Thomas contends the trial court erred in not defining the term "deprive" for the jury and that her trial counsel was ineffective for not requesting that the trial court define the term "deprive" and/or for not objecting when the trial court did not include in its jury instructions a

definition of the term "deprive." Neither of these issues was properly preserved for review.[5]

Thomas did not object to the trial court's jury instructions at any time, and she did not file a motion for a new trial or otherwise challenge her counsel's effectiveness in the trial court. It is well settled that "[r]eview on appeal is limited to review of questions properly and timely raised at trial." Newsome v. State, 570 So. 2d 703, 716 (Ala. Crim. App. 1989). Rule 21.3, Ala. R. Crim. P., specifically provides:

> "No party may assign as error the court's giving or failing to give a written instruction, or the giving of an erroneous, misleading, incomplete, or otherwise improper oral charge, unless the party objects thereto before the jury retires to consider its verdict, stating the matter to which he or she objects and the grounds of the objection."

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[5]In her brief, Thomas argues that the trial court's alleged error and her counsel's alleged error deprived the trial court of jurisdiction to render the judgment or to impose the sentence. However, neither a challenge to a court's jury instructions nor a challenge to counsel's effectiveness is a jurisdictional issue. See, e.g., Jackson v. State, 12 So. 3d 720, 721 (Ala. Crim. App. 2007) (holding that a claim that the trial court failed to properly instruct the jury is nonjurisdictional and waivable), and Cogman v. State, 852 So. 2d 191, 192 (Ala. Crim. App. 2002)(holding that an ineffective-assistance-of-counsel claim is not jurisdictional).

In addition, this Court has noted:

> "It is well settled that ineffective-assistance-of-counsel claims cannot be presented on direct appeal when they have not been first presented to the trial court. Montgomery v. State, 781 So. 2d 1007 (Ala. Crim. App. 2000). Thus, '"[a]n ineffective-assistance-of-counsel claim must be presented in a new trial motion filed before the 30-day jurisdictional time limit set by Rule 24.1(b), Ala. R. Crim. P., expires, in order for that claim to be properly preserved for review upon direct appeal."' 781 So. 2d at 1010, quoting Ex parte Ingram, 675 So.2d 863, 865 (Ala. 1996)."

Shouldis v. State, 953 So. 2d 1275, 1285 (Ala. Crim. App. 2006). "'[W]e will not make exception to the rule that a claim for ineffective assistance of counsel may not be considered on appeal if it was not first presented to the trial court.'" Brown v. State, 701 So. 2d 314, 319-20 (Ala. Crim. App. 1997) (quoting Ex parte Jackson, 598 So. 2d 895, 897 (Ala. 1992), overruled on other grounds by Ex parte Ingram, 675 So. 2d 863, 865 (Ala. 1996)).

Because Thomas presented neither of these issues to the trial court, they were not properly preserved for review and will not be considered by this Court.

V.

Based on the foregoing, the judgment of the trial court is affirmed.

AFFIRMED.

Windom, P.J., and Welch, Joiner, and McCool, JJ., concur.