NO. COA03-1436

NORTH CAROLINA COURT OF APPEALS

Filed: 5 October 2004

STATE OF NORTH CAROLINA

v. Beaufort County
Nos. 02 CRS 3952-53

JANET MISHOE GRAY

Appeal by defendant from judgment entered 8 May 2003 by Judge Thomas D. Haigwood in Beaufort County Superior Court. Heard in the Court of Appeals 16 June 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General J. Allen Jernigan, for the State.

Sue Genrich Berry for defendant appellant.

McCULLOUGH, Judge.

Defendant Janet Mishoe Gray was charged with embezzlement and attempted embezzlement. The State's evidence tended to show that Dr. James H. Roberson is a podiatrist in Washington, North Carolina. In 1993, Dr. Roberson hired defendant, Janet Mishoe Gray, to handle his employee withholding and business taxes. Since defendant operated a bookkeeping and accounting service, Gray's Accounting and Tax Returns, Dr. Roberson believed that defendant was qualified to do these tasks.

Dr. Roberson had a specific procedure in place for employee income tax withholding. Defendant would come to Dr. Roberson's

office, pick up employee work records, and calculate the amount due for each employee's income tax withholding. On some occasions, when defendant had not yet calculated the amount due for withholding taxes, the doctor would give defendant a signed blank check. In those instances, Dr. Roberson gave defendant one check at a time and had specific instructions.

Dr. Roberson paid defendant for her accounting and financial services in a different way. For these services, Dr. Roberson would pay defendant with a separate check. He wrote each check individually and completely for the amount based on the invoices defendant provided. Dr. Roberson never gave blank checks for these services.

Dr. Roberson testified that he never authorized defendant to write out a check to Gray's Accounting for $450.00 on 14 May 1995 or at any other time. At trial, Dr. Roberson identified a check that had his name, phone number, and signature on it. The check was made out to "Gray's Accounting" in the amount of $450.00, and it was written in another person's handwriting. The reverse side of the check indicated that it was deposited to "Gray's Accounting of [sic] Tax Returns." The check's subject line contained the following language: "revision 1989, 1990, and 1991." This was also not written in Dr. Roberson's handwriting. Finally, the check was dated 14 May 1995.

Based on his experience in seeing samples of defendant's handwriting, Dr. Roberson opined that defendant was responsible for the writing on the check. He believed that the notation "revision

1989, 1990, and 1991" was a bogus reference to additional tax work for those years. Dr. Roberson also stated that this was defendant's attempt to cover her tracks because he had already paid defendant for her work on those tax returns. Finally, Dr. Roberson testified that defendant did not do any additional work on his 1989, 1990, and 1991 taxes around May of 1995.

Dr. Roberson learned about this check after receiving a phone call from Wachovia Bank. He asked the bank to hold the check, but the check was deposited to "Gray's Accounting and Tax Returns" before he was able to stop it.

When Dr. Roberson tried to contact defendant at her home, defendant's husband said that she had moved out. Defendant's office was empty, and Dr. Roberson's financial records were missing. Dr. Roberson heard that defendant had relocated to Virginia and South Carolina, but he was unable to reach her.

The bank contacted Dr. Roberson about another suspicious check that was in the amount of $315.00 and appeared to have been tampered with. The only items in the doctor's handwriting were his signature and the numeric amount. On the "pay to order line," the word "cash" appeared. Also, someone wrote the initials "JG" above the word "cash." Dr. Roberson never instructed defendant to write the check out to cash. Representatives from the bank told Dr. Roberson that defendant brought the check to the bank, but the bank was unwilling to cash it.

Dr. Roberson's wife, Lois, testified that she met defendant and believed that defendant was capable. However, Lois Roberson

later became aware of problems with defendant's work. Before defendant left town, Lois Roberson attended an audit with her husband, defendant, and a representative from the Internal Revenue Service. The IRS representative alleged that during some quarters, defendant had not submitted employee withholding taxes for Dr. Roberson. Defendant engaged in a verbal confrontation with the representative and was not able to provide checks showing that the taxes had actually been paid.

Detective Clifton Lee Hales, Jr., testified that he received a report about an embezzlement case on 2 November 1995. After interviewing Lois Roberson, Detective Hales learned about one of the checks that was allegedly unauthorized. Detective Hales was unable to locate defendant in Virginia and South Carolina.

Defendant Janet Mishoe Gray testified that she worked for Dr. Roberson from 1992 through 1995. At the time of trial, defendant had twenty-four years of experience. Dr. Roberson hired her to help with his employee withholding taxes and to assist in getting his prior tax returns up to date. Defendant offered testimony about the $450.00 check. She claimed that she lost the check, but found it in October of 1995. She filled in most of the information on the check and deposited it in her account for "work done." Defendant's explanation was that she had to make revisions to Dr. Roberson's tax returns.

According to defendant, Dr. Roberson gave her the second check for $315.00 at his office. Defendant testified that Dr. Roberson wanted to make it out for cash, but then changed his mind. She

wrote "cash" on the check, crossed it out, initialed the change, and made it out to "First Citizens Bank." Then, she carried the check to the bank and presented it to the teller with a deposit slip.

Defendant acknowledged that the meeting with the IRS occurred in 1994. On cross-examination, defendant testified that she normally charged $300.00 or $500.00 for a tax return and $300.00 for a revision. However, in this instance, defendant agreed to charge Dr. Roberson a lower rate of $150.00 per revision. Thus, the $450.00 check was for three revisions at $150.00 each.

After hearing all of the evidence, the jury found defendant guilty of one count of embezzlement and one count of attempted embezzlement. Defendant appeals.

On appeal, defendant argues that the trial court erred by (1) permitting a fatal variance between the indictments and the evidence presented at trial, (2) denying defendant's motion to dismiss for insufficient evidence, (3) failing to instruct that defendant was at least sixteen years old at the time of the offense, and (4) giving another erroneous jury instruction. Finally, defendant claims that her convictions should be reversed on the basis of ineffective assistance of counsel. We disagree and conclude that defendant received a fair trial free from reversible error.

I. Fatal Variance

Defendant contends that there was a fatal variance between the indictments and the evidence adduced at trial because the

indictments alleged that defendant embezzled and attempted to embezzle "U.S. Currency" instead of specifically naming Dr. Roberson's checks. We disagree.

In criminal cases, the evidence must correspond with the allegations in the indictment. *State v. McCree,* 160 N.C. App. 19, 30, 584 S.E.2d 348, 356, *appeal dismissed, disc. review denied,* 357 N.C. 661, 590 S.E.2d 855 (2003). "Not every variance between the allegations of the indictment and the proof presented at trial is a material variance requiring dismissal." *Id.* "It is only 'where the evidence tends to show the commission of an offense not charged in the indictment [that] there is a fatal variance between the allegations and the proof requiring dismissal.'" *State v. Poole,* 154 N.C. App. 419, 423, 572 S.E.2d 433, 436 (2002) (quoting *State v. Williams,* 303 N.C. 507, 510, 279 S.E.2d 592, 594 (1981)), *cert. denied,* 356 N.C. 689, 578 S.E.2d 589 (2003).

In addition to these well-established principles, this Court's analysis in *State v. Walston,* 140 N.C. App. 327, 536 S.E.2d 630 (2000) is instructive. In that case, defendant was convicted of obtaining property by false pretenses. *Id.* at 329, 536 S.E.2d at 632. On appeal, defendant claimed that there was a fatal variance between the indictment and the evidence offered at trial. *Id.* The Court acknowledged that the indictment charged defendant with obtaining "$10,000.00 in United States Currency." *Id.* at 335, 536 S.E.2d at 635. However, the Court rejected defendant's argument that there was a fatal variance simply because defendant utilized a "blank check to open a bank account rather than to obtain

cash[.]" *Id.* at 336, 536 S.E.2d at 636. It further explained that:

> The fact that the $10,000.00 was in U.S. currency or in a bank account does not change the premise that in either form the sum represented a $10,000.00 value.... Therefore, the purported variance did not go to an essential element of the offense because whether defendant received $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.

As was the case in *Walston,* the distinction between U.S. currency or money in a bank account in the present case is legally insignificant. The purported variance does not go to an essential element of the offense because whether defendant received the money in cash or deposited it in a bank account through two separate checks, she received something of monetary value. Accordingly, this assignment of error is without merit.

II. Sufficiency of the Evidence

Defendant argues that the trial court erred in denying her motion to dismiss the embezzlement charge based on insufficiency of the evidence. "In considering such a motion, the trial court must determine whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of such offense." *State v. Serzan,* 119 N.C. App. 557, 560, 459 S.E.2d 297, 300 (1995), *cert. denied,* 343 N.C. 127, 468 S.E.2d 793 (1996). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a

conclusion." *State v. Smith,* 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "The trial court's function is to decide whether the evidence will permit a *reasonable inference* that the defendant is guilty of the crime charged." *Serzan,* 119 N.C. App. at 560, 459 S.E.2d at 300. "The trial court is not required to determine that the evidence excludes every reasonable hypothesis of innocence before denying defendant's motion to dismiss." *Id.*

The crime of embezzlement is addressed in N.C. Gen. Stat. § 14-90 (2003). This Court has determined that the essential elements of the offense are: (1) defendant was the prosecutor's agent; (2) defendant received property of his principal by the terms of his employment; (3) defendant received the property in the course of his employment; and (4) defendant converted the property to his own use knowing it was not his. *State v. Buzzelli,* 11 N.C. App. 52, 54-55, 180 S.E.2d 472, 475, *cert. denied,* 279 N.C. 350, 182 S.E.2d 583 (1971).

In this case, there was substantial evidence of each element of embezzlement and of defendant's perpetration of the offense. Defendant was employed as Dr. Roberson's bookkeeper. While working in that capacity, defendant received two partially completed checks for the purpose of paying Dr. Roberson's employee withholding taxes. Defendant made one check out to her business, while attempting to make the other out to "cash." Finally, defendant deposited $450.00 of Dr. Roberson's funds into her own account. This evidence permits the reasonable inference that defendant was

guilty of embezzlement. Therefore, the motion to dismiss was properly denied, and this assignment of error is overruled.

III. Failing to Instruct on Age

Defendant contends that the trial court erred in failing to instruct the jury that it needed to prove that defendant was at least sixteen years old at the time of the offense. This argument is absolutely meritless. First, the trial court informed the attorneys that he would be using the Pattern Jury Instructions, including N.C.P.I., Crim. 218.10, the appropriate instruction for embezzlement in this case.[1] At that time, defendant did not object. More importantly, this pattern jury instruction does not call for the trial judge to mention defendant's age in the jury charge. Instead, the trial judge must comply substantially with the following:

> The defendant has been accused of embezzlement, which occurs when a(n) *(name fiduciary capacity)* rightfully receives property in his role as *(name fiduciary capacity)* and then fraudulently and dishonestly uses it for some purpose other than that for which he received it.
>
> Now I charge that for you to find the defendant guilty of embezzlement, the State must prove three things beyond a reasonable doubt:
>
> First, that the defendant was a(n) *(name fiduciary capacity)* of the victim.

[1] N.C.P.I., Crim. 218.10 is the appropriate instruction since the offenses occurred before 1 December 1997 and the value of the property was less than $100,000.00.

> Second, that while acting as the victim's *(name fiduciary capacity)*, the defendant rightfully received *(describe property)*.
>
> And Third, that the defendant fraudulently and dishonestly used *(describe property)* for some purpose other than that for which he received it.
>
> So I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant rightfully received *(describe property)* as a(n) *(name fiduciary capacity)* of the victim and that he fraudulently and dishonestly used that property for some purpose other than that for which he received it, it would be your duty to return a verdict of guilty of embezzlement. However, if you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

N.C.P.I., Crim. 218.10 (footnote omitted).

We also note that this Court rejected a similar argument in *State v. Cook*, ___ N.C. App. ___, ___ S.E.2d ___ (COA02-1582, filed 3 August 2004). There, defendant was not entitled to an instruction on age in an embezzlement case because there was no evidence suggesting that defendant was under the age of 16. *Id.*

We believe that a similar result is warranted in the present case. Defendant was in her forties when the offenses occurred in May through November of 1995. She also testified at trial that she had been working as a bookkeeper for 24 years. Finally, we also cannot envision a scenario in which Dr. Roberson, a podiatrist for over 35 years, would hire someone under the age of 16 to be his bookkeeper. For these reasons, this assignment of error is denied.

IV. Other Instructional Error

Defendant also claims that the trial judge erred in instructing the jury that serving as a bookkeeper created a fiduciary relationship. Defendant suggests that this relieved the State of its burden to prove an element of the crime beyond a reasonable doubt. We disagree.

The term "fiduciary" has been broadly defined as "[a] person who is required to act for the benefit of another person on all matters within the scope of their relationship[.]" *Black's Law Dictionary* 658 (8th ed. 2004). In this case, Dr. Roberson hired defendant to be his bookkeeper, and defendant was entrusted with a number of financial responsibilities. Certainly, a bookkeeper would qualify as a fiduciary under this definition.

Furthermore, as we have indicated, the trial judge informed the attorneys that he intended to give N.C.P.I., Crim. 218.10, the pattern jury instruction for embezzlement. That instruction mentions that to prove the first element of the offense, the State must show "that the defendant was a(n) *(name fiduciary capacity)* of the victim." N.C.P.I., Crim. 218.10. The trial judge proposed to use the word "bookkeeper" as the fiduciary capacity, and defendant did not object at that time. We do not believe that filling in the word "bookkeeper" as the fiduciary relationship harmed defendant in any way. In fact, the trial judge appears to be following the mandate of the instruction by naming the specific fiduciary capacity in this case. Therefore, defendant's assignment of error is rejected.

V. Ineffective Assistance of Counsel

Defendant argues that the performance of counsel at trial was so ineffective that the result in this case is inherently unreliable. "A defendant's right to counsel includes the right to the effective assistance of counsel." *State v. Braswell,* 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985). "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." *Id.* at 561-62, 324 S.E.2d at 248. To meet this burden, defendant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced defendant. *Id.* at 562, 324 S.E.2d at 248. A reversal is not warranted "unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Id.* at 563, 324 S.E.2d at 248.

Defendant claims that her counsel made three errors: (1) failing to make a motion to dismiss for an alleged fatal variance, (2) not calling for a jury instruction on age, and (3) failing to object to the instructions regarding defendant's fiduciary capacity. However, we have already determined that there was no fatal variance between the indictments and the evidence adduced at trial, and there was no error in the jury instructions with regard to defendant's age or her fiduciary capacity. Therefore, we do not believe that counsel's performance was deficient in any way or that a different result would have occurred if counsel had raised these objections at trial. This assignment of error is overruled.

Our careful review of this case leads us to conclude that defendant received a fair trial free from reversible error.

No error.

Judges McGEE and ELMORE concur.

Report per Rule 30(e).