NO. COA05-1179

NORTH CAROLINA COURT OF APPEALS

Filed: 1 August 2006

STATE OF NORTH CAROLINA

v. Caldwell County
No. 04 CRS 001187

MARJORIE COPPAGE KIRBY

Appeal by Defendant from judgment entered 21 February 2005 by Judge Beverly T. Beal in Caldwell County Superior Court. Heard in the Court of Appeals 12 April 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Richard L. Harrison, for the State.

Michael E. Casterline for Defendant-Appellant.

STEPHENS, Judge.

Defendant, Marjorie Coppage Kirby, appeals from a judgment of the trial court upon a conviction of obtaining property by false pretenses. In support of her appeal, she brings forth three assignments of error. For the reasons stated herein, we find no error in Defendant's trial and therefore affirm the judgment.

The State's evidence tended to show that on 8 July 2003, Defendant, a regular customer, went to a local Wachovia branch (First Union Bank at the time) to cash a check drawn on Regions Bank. The check was made payable to Defendant in the amount of $5,000.00. The teller, Helen Harmon, processed the check and gave Defendant $5,000.00 in cash. Ms. Harmon had known Defendant since 1993, and Defendant had previously baby-sat Ms. Harmon's daughter.

To process the check presented by Defendant, Ms. Harmon accessed Defendant's account information with First Union "to verify that she had a good relationship with the bank[,]" checked Defendant's driver's license, and had a second teller "look at the check with us to make sure that we're following all of our policies and procedures in cashing it." Upon completing those procedures, Ms. Harmon "was able to cash [the check] upon recommendation of [Defendant's] account history."

Subsequently, the check was returned to First Union stamped as "refer to micker or suspected counterfeit." According to Ms. Harmon, a "micker" is a device that scans the code on the bottom of checks and if the check is counterfeit, "a lot of times that scanner will kick it out. . . ." Ms. Harmon did not run the check through the micker when Defendant presented it to her, explaining that "[i]f we know the customer, then we are a little bit more lienant [sic]. . . ." When the check was returned, the amount was charged back to First Union which, in turn, charged it back to Defendant's account and notified her of the transaction.

First Union also assigned Randall West, a fraud investigator employed with the bank for approximately thirty-three years, to investigate the matter. When he was unable to locate Defendant's address and found that the telephone numbers the bank had on her account had been disconnected, Mr. West contacted Detective Jeffrey Dick at the Lenoir Police Department.

Detective Dick, who had been in law enforcement for thirty-three years, began an investigation. On 19 September 2003,

Detective Dick contacted Defendant at her home. He showed her the check that had been returned to First Union, and Defendant "admitted that that was in fact the check that she had presented." Defendant told Detective Dick that she received the check from a Canadian financing company through an online loan transaction in which she was to receive a total of $75,000.00. Detective Dick testified that Defendant told him the company was sending her the money in $5,000.00 increments and the check that had been returned was the first check she had received. Defendant also told the detective that she paid a $124.00 application fee to the financing company. She did not know the name of the company and according to Detective Dick, she told him she no longer had the computer she used to complete the transaction. She also stated that she had recently filed for bankruptcy "by herself" without the help of a lawyer, and that the bank would be paid back under the bankruptcy plan. Detective Dick did not ask Defendant how she paid the $124.00 application fee. He also did not contact Regions Bank about the check. He testified that Defendant was pleasant and cooperative during his conversation with her.

Defendant offered evidence on her behalf, testifying that she and her husband were about to lose their home, that they had exhausted conventional means of obtaining refinancing to keep their home, and that she had therefore "as a last resort . . . started checking on line." She said she sent out "all kinds of applications" and eventually received an e-mail to which she responded with the requested information, including a new bank

account number that she had set up at Bank of America. Thereafter, "[t]o initialize and start the paperwork for a home mortgage loan[,]" Defendant forwarded by Western Union a payment of $124.00. She then received in the mail a check in the amount of $5,000.00 "as the initial installment on the home mortgage."

Defendant testified that she took the check to First Union and cashed it, and then went to Bank of America for a cashier's check made payable to the Clerk of Court in Caldwell County so that she could place an upset bid with the Clerk to keep from losing her home. She said she got the cashier's check from Bank of America because there was no charge for it there since she had just opened a new account, whereas First Union would have charged her "$10 or $20" for the check and she was "trying to save money[.]" She also used some of the $5,000.00 to have the electricity turned back on at her house and to buy a new refrigerator.

Defendant testified further that upon receiving notification from First Union that the "check wasn't good[,]" and that she would have to pay the money back to First Union, "we had to go ahead and file a bankruptcy[]" because she and her husband did not have $5,000.00 to pay the bank back and they were still trying to save their home. She testified that their bankruptcy plan "is one hundred percent[,]" by which she meant that all debts listed in the plan, including the $5,000.00 owed to First Union (Wachovia), are "to be paid off in full."

Defendant acknowledged Detective Dick's visit to her home in September 2003, but she disagreed with his recollection of the

particulars of that visit. Specifically, she testified that she still had her computer at the time and that the detective observed it in her living room. She also said that she gave Detective Dick "[a]ll the paperwork that I had from where I sent the money for the loan," and showed him a copy of her bankruptcy filing. She did not remember telling Detective Dick that the remainder of the $75,000.00 loan was to be paid in $5,000.00 increments, as that was not her understanding of how the loan was to be paid. Instead, according to Defendant, the initial check for $5,000.00 "was sent up front . . . like good faith money" that was being paid early so that she and her husband could save their home. On cross-examination, Defendant admitted that in 1998, she had written a check to a local grocery store that "wasn't any good," although she denied knowing that the check was worthless when she wrote it and testified that she had paid the money back through the magistrate's office "immediately" upon being notified that the check was bad.

Defendant's husband, a disabled veteran, and her nineteen-year-old daughter, a full-time student, corroborated Defendant's testimony. Detective Dick testified in rebuttal and denied Defendant's testimony about the visit he made to her home. On 15 February 2005, a jury found Defendant guilty of one count of obtaining property by false pretenses, and the trial judge imposed a suspended sentence of six to eight months. In addition, a bill of restitution in the amount of $6,475.00 was entered against Defendant. Defendant appeals.

By her first assignment of error, Defendant argues that the

trial court committed reversible error by not properly explaining her rights regarding appointed counsel. We note that Defendant did not object to her counsel at trial. On the contrary, when directly questioned by Judge Beal as to whether she agreed to be represented by the attorney who appeared with her, Defendant replied, "Yes, sir."

Rule 10 of the North Carolina Rules of Appellate Procedure provides as follows:

> In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. Any such question which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be made the basis of an assignment of error in the record on appeal.

N.C.R. App. P. 10(b)(1) (2005). "Even alleged errors arising under the Constitution of the United States are waived if defendant does not raise them in the trial court." *State v. Jaynes,* 342 N.C. 249, 263, 464 S.E.2d 448, 457 (1995), *cert. denied,* 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996) (citations omitted). By failing to object to her attorney at trial, Defendant has waived this purported error.

Moreover, Defendant does not contend that the trial judge's alleged failure to properly explain her rights to appointed counsel amounted to plain error. Under Rule 10(c)(4) of the appellate rules, in criminal cases, a question not preserved by objection at

trial "may be made the basis of an assignment of error where the judicial action questioned is *specifically and distinctly* contended to amount to plain error." N.C.R. App. P. 10(c)(4)(2005)(emphasis added); *see, e.g., State v. Dennison,* 359 N.C. 312, 608 S.E.2d 756, *rev. denied*, 360 N.C. 69, 622 S.E.2d 113 (2005); *State v. Moore,* 132 N.C. App. 197, 511 S.E.2d 22, *cert. denied*, 350 N.C. 103, 525 S.E.2d 469 (1999). For these reasons, this assignment of error is not properly before us, and we thus decline to consider it.

By her second assignment of error, Defendant argues that the trial court committed plain error by allowing Detective Dick to speculate about how easily counterfeit checks could be created. We disagree.

Plain error is an error which is "'so fundamental that it amounts to a miscarriage of justice or probably resulted in the jury reaching a different verdict than it otherwise would have reached[,]'" but for the error. *State v. Lawson*, 159 N.C. App. 534, 538, 583 S.E.2d 354, 357 (2003)(*quoting State v. Collins,* 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993)(citations omitted)). Our Courts have applied the plain error rule to issues involving the admission of evidence. *Id.; see also State v. Black,* 308 N.C. 736, 303 S.E.2d 804 (1983). However, reversal for plain error is appropriate in only the most exceptional of cases, *State v. Odom,* 307 N.C. 655, 300 S.E.2d 375 (1983), and the burden on a defendant asserting plain error is "much heavier" than that imposed on a defendant who preserves her rights by timely objection at trial. *State v. Walker,* 316 N.C. 33, 39, 340 S.E.2d 80, 83-84 (1986).

In this case, on direct examination Detective Dick testified as to his investigation after he was alerted that the check was suspected to be counterfeit. On cross-examination, the following exchange occurred:

> Q. You say that. . .you informed [Defendant] that Regions Bank was claiming that the check she had was a counterfeit check?
> A. Well, no I said Wachovia was saying that it was counterfeit.
> Q. You know now in fact that it was Regions Bank that said it was counterfeit?
> MS. LEE: Objection.
> THE COURT: Objection sustained.
> THE WITNESS: In today's, you know, identity theft world that we exist in today, anyone can go to say Staples and obtain check paper, magnetic ink, and get a versatile check system, and print out your own checks. And you could probably put, with a scanner, you could put any kind of logo you want on it. It's common practice for people to do counterfeit checks —
> Q. Are you saying that's what happened here?
> A. I don't know.

Defendant did not move to strike or otherwise indicate any objection to the witness's statement. On her plain error appeal, however, she contends that (1) this evidence was not properly admitted as expert evidence because the State did not establish any foundation to support the use of expert evidence on the creation of counterfeit checks, (2) the evidence was improperly admitted as the witness's lay opinion, and (3) the State used this testimony to insinuate that Defendant created the counterfeit check herself. However, there is no evidence that Defendant created the check, and Detective Dick plainly said that he did not know if that is what happened here. In addition, the State never asked Detective Dick about how to create a counterfeit check either before or after the

aforementioned response was made by him during cross-examination. Given the other evidence presented at trial, we are not convinced that, without Detective Dick's statement, the outcome of the trial would have been different. We thus hold that the trial court did not commit plain error by failing to strike Detective Dick's testimony *sua sponte*. This assignment of error is without merit.

By her final assignment of error, Defendant argues that the trial court also committed plain error by allowing improper hearsay declarations that the check was "counterfeit" when there was no direct evidence as to why Regions Bank would not pay the check and no other evidence establishing that the check was counterfeit. Again, Defendant did not object to the characterization of the check as counterfeit at trial, a characterization that was offered multiple times as the following examples establish:

Randall West, the bank's fraud investigator, identified the check that had been returned to First Union and testified that it had been stamped "suspected counterfeit." He responded to a question as to why he received the check by stating that the check was sent back from Regions Bank "as counterfeit," and had been "assigned out to [him] because it was counterfeit." On cross-examination, he testified further about the check as follows:

> Q. . . . Now do you know if there's anything in particular about that check that caused Regions Bank to send it back?
> A. Probably the—
> Q. If you know just tell me, but if you don't know—
> A. I don't really know why.
> Q. . . . All you know is the check got sent back?
> A. Stamped counterfeit.

Detective Dick also identified the check and it was introduced in evidence, without objection, through his testimony. Moreover, Defendant repeatedly noted that the check "wasn't good" during her own testimony on both direct and cross-examination. For example, in response to a question on cross-examination by the State as to when she filed her bankruptcy case, Defendant replied, "As soon as we found out that the check was no good[.]" Indeed, it is plain that, at trial, Defendant did not question the nature of the check she cashed at First Union; on the contrary, she accepted that it "wasn't good" and defended the charge against her on grounds that she did not know the check was counterfeit when she presented it to the bank and therefore, did not knowingly negotiate a counterfeit check.

The check, which was published to the jury, had the following stamped upon it: "SUSPECTED COUNTERFEIT." Defendant asserts that the stamp and the witnesses' testimony constitute inadmissible hearsay because the person who reached that conclusion was not present in court to testify. Thus, Defendant argues that her constitutional right to confront the witnesses against her was violated. Again, however, we disagree. First, it is well established that "[f]ailure to object to the introduction of evidence is a waiver of the right to do so, 'and its admission, even if incompetent, is not a proper basis for appeal.'" *State v. Lucas,* 302 N.C. 342, 349, 275 S.E.2d 433, 438 (1981) (citations omitted); *see also State v. McNeil,* 350 N.C. 657, 518 S.E.2d 486 (1999), *cert. denied,* 529 U.S. 1024, 146 L. Ed. 2d 321 (2000).

Second, as discussed above, to establish that the admission of this evidence constitutes plain error justifying a new trial for Defendant, she must establish to this Court's satisfaction that the evidence was erroneously admitted and that, but for that error, the jury probably would have reached a different verdict. *See, e.g., State v. Robinson,* 330 N.C. 1, 409 S.E.2d 288 (1991), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995).

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]"

State v. Odom, 307 N.C. at 660, 300 S.E.2d at 378 (*quoting United States v. McCaskill,* 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982) (footnotes omitted) (emphasis in original)).

On appeal, Defendant assigns as plain error the admission of the State's witnesses' testimony that the check was counterfeit and the introduction of the check in evidence, but she does not challenge any of her own numerous statements that the check "wasn't good." Our review of the entire record, then, establishes that even if the admission of the disputed evidence was error, there was sufficient unchallenged evidence from which the jury could conclude that the check was counterfeit. Therefore, we are not convinced that, absent the introduction of the check itself and the State's witnesses' characterization of the check as "counterfeit," the jury would have reached a different verdict. This assignment of error

is thus overruled.

We hold that Defendant received a fair trial free from prejudicial error.

NO ERROR.

Judges MCGEE and HUNTER concur.

Report per Rule 30(e).