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NO. COA05-1585

NORTH CAROLINA COURT OF APPEALS

Filed: 21 November 2006

STATE OF NORTH CAROLINA

v.

Davidson County  
No. 03 CRS 50050

CYNTHIA MORGAN FORD

Appeal by defendant from judgment entered 20 May 2005 by Judge W. Douglas Albright in Davidson County Superior Court. Heard in the Court of Appeals 30 October 2006.

*Roy Cooper, Attorney General, by Assistant Attorney General Spurgeon Fields, III, for the State.*

*Anne Bleyman, for defendant-appellant.*

MARTIN, Chief Judge.

Defendant appeals from a judgment imposing a suspended sentence and supervised probation entered upon defendant's conviction by a jury of embezzlement. The bill of indictment upon which defendant was tried alleged, in pertinent part:

[T]he defendant . . . unlawfully, willfully and feloniously did embezzle, fraudulently and knowingly misapply and convert to the defendant's own use, and take and make away with and secrete with the intent to embezzle \$6,887.98 in good and lawful United States currency belonging to Thomasville Furniture Industries. At the time the defendant was over sixteen (16) years of age and was the employee of Thomasville Furniture Industries .

. . .

The evidence at trial, as pertinent to this appeal, tended to show that defendant was employed by Thomasville Furniture Industries, Inc. as a dock worker. One of her responsibilities in this position was handling employee ticket program purchases and employee furniture purchases. The employee ticket program was a program allowing employees to purchase discount tickets for places such as amusement parks, while the employee furniture purchases involved employees buying furniture directly from the employer, Thomasville Furniture Industries, Inc. In handling these purchases, defendant was required to generate monthly sales reports and to turn over to the treasurer's office the funds she received from employees making ticket or furniture purchases.

In late 2002, defendant was repeatedly asked by supervisors about money from employee purchases which should have been turned over to the treasurer's office, but which was never received by the treasurer's office. Defendant could not explain the missing funds except to suggest that someone may have gone through her desk or broken into the file cabinet where the funds were kept, but no evidence of such tampering was found. Thereafter, defendant was terminated from her position with Thomasville Furniture Industries, Inc. on 13 December 2002.

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On appeal, defendant first argues, and the State concedes, that the indictment charging defendant with embezzlement was fatally defective because it did not properly allege the identity

of the victim. After careful consideration of the indictment and the controlling precedent, we must agree.

First, we note that defendant did not object to the sufficiency of the indictment at trial. While an objection must normally be made to the trial court for an issue to be reviewable on appeal, N.C.G.S. § 15A-1446(d) provides exceptions to this general rule. Under N.C.G.S. § 15A-1446(d)(1), arguments regarding “[l]ack of jurisdiction of the trial court over the offense of which the defendant was convicted” may be the subject of review on appeal despite a party’s failure to object at the trial level. In addition, under N.C.G.S. § 15A-1446(d)(4), another argument a party may make for the first time on appeal is that “[t]he pleading fails to state essential elements of an alleged violation.” Because the arguments excepted by N.C.G.S. § 15A-1446(d)(1) and (4) are included in the defendant’s argument that the indictment was fatally defective, that argument may be properly reviewed on appeal, despite the defendant’s failure to object to the indictment at the trial level. See *State v. Call*, 353 N.C. 400, 428-29, 545 S.E.2d 190, 208 (2001); *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981).

“It is elementary that a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony.” *Sturdivant*, 304 N.C. at 308, 283 S.E.2d at 729 (citing N.C. Const. art. I, § 22; *State v. Simpson*, 302 N.C. 613, 276 S.E.2d 361 (1981); *State v. Crabtree*, 286 N.C. 541, 212 S.E.2d 103 (1975)); see *State v. Thornton*, 251 N.C. 658, 660, 111 S.E.2d 901,

902 (1960); *State v. Williams*, 153 N.C. App. 192, 194, 568 S.E.2d 890, 892 (2002).

In order for a bill of indictment to be valid, it must allege all essential elements of the offense with which the defendant is charged. *Williams*, 153 N.C. App. at 194, 568 S.E.2d at 892; *State v. Hughes*, 118 N.C. App. 573, 575, 455 S.E.2d 912, 914 (1995).

One of the essential elements of embezzlement, which must therefore be in the bill of indictment, is an allegation of "ownership of the property in a person, corporation or other legal entity able to own property." *Hughes*, 118 N.C. App. at 576, 455 S.E.2d at 914; see *Thornton*, 251 N.C. at 660-61, 111 S.E.2d at 902-03.

If the property alleged to be embezzled is owned by a corporation, the fact that the alleged victim is a corporation should be stated in the indictment unless the name of the alleged victim includes language indicating it is a corporation. See *Thornton*, 251 N.C. at 662, 111 S.E.2d at 903. Under N.C.G.S. § 55D-20(a)(1), "[t]he name of a corporation must contain the word 'corporation', 'incorporated', 'company', or 'limited', or the abbreviation 'corp.', 'inc.', 'co.', or 'ltd.'" Failure to include such language when stating the name of an alleged corporate victim in an indictment is insufficient to appropriately identify the victim as a corporation. See *Thornton*, 251 N.C. at 662, 111 S.E.2d at 903-04; *State v. Thompson*, 6 N.C. App. 64, 66, 169 S.E.2d 241, 242 (1969). Failure to properly identify an alleged corporate victim as a corporation renders an indictment fatally defective.

See *Thornton*, 251 N.C. at 662, 111 S.E.2d at 904; *State v. Cathey*, 162 N.C. App. 350, 352-53, 590 S.E.2d 408, 410 (2004); *State v. Roberts*, 14 N.C. App. 648, 649, 188 S.E.2d 610, 611-12 (1972); *Thompson*, 6 N.C. App. at 66, 169 S.E.2d at 242.

In the bill of indictment in the present case, the victim is alleged to be "Thomasville Furniture Industries." Thomasville Furniture Industries is clearly not a natural person, yet there is no statement in the indictment that it is a corporation, nor is the fact that it is a corporation clear from its name because the name does not include any of the language set out in N.C. Gen. Stat. § 55D-20(a)(1) that would identify Thomasville Furniture Industries as a corporation. The failure of the indictment to identify the alleged victim as a corporate entity capable of owning property constitutes a failure to allege an essential element of the charge against defendant, thus making the indictment fatally defective and depriving the trial court of jurisdiction over the matter. Thus, as defendant argues and the State concedes, defendant's conviction for embezzlement must be vacated.

Vacated.

Judges TYSON and CALABRIA concur.

Report per Rule 30(e).