NO. COA06-1097

NORTH CAROLINA COURT OF APPEALS

Filed: 19 June 2007

STATE OF NORTH CAROLINA

v. Alamance County
Nos. 05 CRS 54624-54629,
05 CRS 55220-55225

LISA FAYE WHITFIELD

Appeal by Defendant from judgment entered 16 February 2006 by Judge J. B. Allen, Jr. in Superior Court, Alamance County. Heard in the Court of Appeals 27 March 2007.

Attorney General Roy Cooper, by Assistant Attorney General Dana B. French, for the State.

Irving Joyner, for the Defendant-appellant.

WYNN, Judge.

Defendant appeals from her convictions for obtaining property by false pretenses. After careful review, we find no error in her trial.

The underlying facts tend to show that Martha Covington hired Defendant Lisa Faye Whitfield to provide care for her father, Lucian King. During Defendant's employment, Ms. Covington received notice from First Union/Wachovia Bank informing her that Mr. King's bank account was overdrawn. She contacted the bank after the second notice and the bank informed her that six checks, dated from 15 May 2005 to 23 May 2005, were written to Defendant under Mr.

King's signature. The checks had been cashed at a store in Mebane, North Carolina.

Ms. Covington contacted the police and informed them that several of Mr. King's checks were missing from her home. She also stated that Defendant had access to her home where all of Mr. King's checks were kept.

Thereafter, Defendant was charged with six counts each of forgery, uttering, and obtaining property by false pretenses. Following a jury trial, Defendant was convicted on all counts. The trial court sentenced Defendant to consecutive terms of ten to twelve months for four of her convictions on obtaining property by false pretenses, suspended sentences for the remaining two convictions of obtaining property by false pretenses, and entered prayers for judgment continued on all of the forgery and uttering convictions. The trial court further ordered Defendant to pay restitution to the store.

Preliminarily, we address the State's Motion to Dismiss Defendant's Appeal from the trial court's entry of prayer for judgment continued on all of her forgery and uttering convictions. The State contends a prayer for judgment continued is not a final judgment and, therefore, Defendant does not have a right to appeal from those convictions. We agree.

Under Section 15A-101(4a) of the North Carolina General Statutes, an entry of judgment occurs when a "sentence is pronounced." Additionally, a "prayer for judgment continued upon

payment of costs, without more, does not constitute the entry of judgment." N.C. Gen. Stat. § 15A-101(4a) (2005).

Here, the trial court entered prayer for judgment, without any other conditions attached for the convictions of forgery and uttering. Because there is no entry of judgment for these convictions, this Court does not have jurisdiction over these matters. *See State v. Southern*, 71 N.C. App. 563, 566, 322 S.E.2d 617, 619 (providing that when a prayer for judgment is continued, no judgment is entered and no appeal is possible), *aff'd*, 314 N.C. 110, 331 S.E.2d 688 (1985). Thus, we grant the State's Motion to Dismiss Defendant's appeal from the trial court's entry of prayer for judgment continued on all of her forgery and uttering charges.

On appeal, Defendant contends that the trial court erred by (I) failing to dismiss the convictions for obtaining property by false pretenses; (II) admitting statements in violation of Defendant's constitutional right of confrontation; and (III) preventing Defendant from introducing evidence of unsuccessful attempts to serve a subpoena on Mr. King.

I.

Defendant first argues that the trial court erred by failing to dismiss the convictions for obtaining property by false pretenses because there was insufficient evidence. Because Defendant did not preserve this issue for appellate review, we dismiss this assignment of error.

Under Rule 10(b)(3) of the North Carolina Rules of Appellant Procedure, "[a] defendant in a criminal case may not assign as

error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action . . . at trial." N.C. R. App. P. 10(b)(3).

Here, Defendant concedes that she failed to make a motion at trial to dismiss the charges for obtaining property by false pretenses; nonetheless, she asks this Court to apply plain error review. However, our Supreme Court has limited plain error review to jury instructions and the admissibility of evidence; therefore, we are without authority to extend plain error to sufficiency of evidence. *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). Accordingly, we dismiss this assignment of error.

II.

Defendant next argues that the trial court committed plain error by allowing Martha Covington and Corporal Dean Culler to testify to statements by Mr. King, a cell phone representative, and bank officials, in violation of the holdings in *Crawford v. Washington*, 541 U.S. 36, 158 L.Ed.2d 177 (2004) and *Davis v. Washington*, 126 S. Ct. 2266, 165 L.Ed.2d 224 (2006). We disagree.

Under the plain error rule, "a defendant must convince this Court, with support from the record, that the claimed error is so fundamental, so basic, so prejudicial, or so lacking in its elements that absent the error the jury probably would have reached a different verdict." *State v. Cummings*, 352 N.C. 600, 636, 536 S.E.2d 36, 61 (2000) (citation omitted).

Before we can determine whether the rulings in *Crawford* and *Davis* apply, we must first determine whether the statements

Defendant assigns error to are hearsay. This Court has defined hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *In re Mashburn*, 162 N.C. App. 386, 390, 591 S.E.2d 584, 588 (2004) (*citing State v. Carroll*, 356 N.C. 526, 542, 573 S.E.2d 899, 910 (2002)). However, "out of court statements offered for purposes other than to prove the truth of the matter asserted are not considered hearsay." *Id.*

Here, Defendant contends that Ms. Covington's statement that Mr. King never authorized Defendant to write the checks constituted hearsay. The record, however, does not reveal that Ms. Covington made this statement. Instead the record shows Ms. Covington made statements as to whether her father allowed anyone to have access to his paperwork. Those statements constituted permissible opinion. She was "not testifying as an expert" and her "testimony [was] in the form of opinions or inferences," which was "limited to those opinions or inferences which . . . [were] . . . rationally based on her . . . perception . . . and . . . helpful to a clear understanding of . . . [her] testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2005).

Additionally, Ms. Covington's statements concerning the bank official's statements that Mr. King's account was overdrawn and that Defendant was the payee are not considered hearsay because the statements were not admitted to prove the truth of matter asserted. As Mr. King's attorney-in-fact, she was concerned with his account being overdrawn and the reason behind the overdrawn account.

Moreover, Defendant waived her right to challenge the evidence because all six checks were admitted into evidence without objection. *See State v. Wright*, 270 N.C. 158, 159, 153 S.E.2d 883, 883 (1967) (providing that "[i]f incompetent evidence is admitted over objection but the same evidence has theretofore or thereafter been given in other parts of the examination without objection, the benefit of the exception is ordinarily lost") (internal quotes and citations omitted).

Defendant also challenges statements made by Corporal Culler regarding cell phone bills as being hearsay. However, Defendant was not convicted of obtaining property by false pretenses as it relates to the cell phone bills. Thus, any admission of those statements was harmless.

Since the statements were not hearsay, there is no need to analyze whether the statements were admitted in violation of *Crawford* or *Davis*. Hence, Defendant's assignments of error are without merit.

III.

Defendant last argues that the trial court erred by preventing her from introducing evidence of unsuccessful attempts to serve a subpoena upon Mr. King because this evidence was relevant. We disagree.

Under Rule 401 of the North Carolina Rules of Evidence, relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be

without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2005). If evidence is relevant, then it is admissible ("except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules"); if evidence is not relevant, then it is inadmissible. N.C. Gen. Stat. § 8C-1, Rule 402 (2005).

Here, Defendant's counsel attempted to self serve Mr. King with a subpoena the night before trial. The trial court found that Defendant was not blocked from subpoenaing Mr. King because she did not seek the court's assistance in getting the witness to court. We agree that the evidence regarding Defendant's alleged blocked efforts to self serve the subpoena was irrelevant.

Dismissed in part, no error in part.

Judges BRYANT and GEER concur.

Report per Rule 30(e).