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NO. COA06-138

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 2006

STATE OF NORTH CAROLINA

v.

Yancey County
No. 04 CRS 50403

LONNY DEE PARKER

Appeal by defendant from judgment entered 16 August 2005 by Judge Laura J. Bridges in Yancey County Superior Court. Heard in the Court of Appeals 19 October 2006.

Roy Cooper, Attorney General, by Ann W. Matthews, Assistant Attorney General, for the State.

Michael E. Casterline for defendant-appellant.

MARTIN, Chief Judge.

Defendant Lonny Dee Parker ("defendant") was indicted for obtaining property by false pretenses in violation of N.C.G.S. § 14-100. A jury returned a verdict of guilty, and the defendant was sentenced to an active term of imprisonment of not less than ten months nor more than twelve months. He appeals.

At trial, the State offered evidence tending to show that on the evening of 19 April 2004, the defendant went to the homes of Janet H. Grindstaff and Danny Sain. Defendant first went to the home of Mrs. Grindstaff, told her that his truck had broken down, and asked her to loan him \$30.00 so he could get a tow truck. Mrs.

Grindstaff did not know defendant or his family and explained that her husband was away and that she had no money. Nevertheless, the defendant persisted in his request, promising that he would repay the money, and asking her if she knew of any other person from whom he might get the money. Eventually, Mrs. Grindstaff, believing that defendant would not otherwise leave, agreed to give him \$30.00 that belonged to her granddaughter. Defendant gave her a vehicle registration card and told her he would return the next day to repay the money.

Later the same evening, defendant went to the home of Mr. Sain. The defendant repeated the same story that he had told Mrs. Grindstaff: that his truck had broken down and that he needed \$30.00 to get it towed. Mr. Sain declined to lend him the money, but permitted the defendant to use his telephone. After attempting to use Mr. Sain's phone for about half an hour, defendant left. Both Ms. Grindstaff and Mr. Sain testified that the defendant had driven to their respective homes in a tan truck.

Defendant did not return to Mrs. Grindstaff's home the following day and never repaid the \$30.00. On 26 April 2004, a week after the events above, Mrs. Grindstaff and Mr. Sain were interviewed by Officer John Robinson of the Yancey County Sheriff's Department. Officer Robinson knew the defendant and his father, but testified that he was not aware as to whether the defendant owned a truck the evening of 19 April 2004. Mrs. Grindstaff turned over to Officer Robinson the vehicle registration card that defendant had given her.

Defendant's motion to dismiss at the close of the State's evidence was denied. Defendant offered evidence tending to show that his 1980 Chevrolet truck had broken down two or three days prior to 19 April. Though he and others tried to repair the truck over the next two or three days, they were unable to get it to run. He went to the home of a friend to borrow some money to have the truck towed, but the friend, who lived near the Grindstaff residence, was not at home. He noticed that Mrs. Grindstaff's lights were on, so he stopped to ask her for money to tow the truck. After receiving \$30.00 from her, he used her telephone to call William Davis, who owned a flatbed tow truck. He met Davis at the service station where the truck was located, and Davis towed the truck to defendant's home. Shortly thereafter, defendant was arrested on unrelated charges and spent several days in jail in McDowell County. Defendant's father testified in corroboration of his son's testimony. Defendant's renewed motion to dismiss at the close of all the evidence was also denied.

Defendant assigns error to the denial of his motion to dismiss made at the close of all the evidence. "When considering a motion to dismiss, the trial court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004). "If substantial evidence exists to support each essential element of the crime charged and that defendant was

the perpetrator, it is proper for the trial court to deny the motion ." *Id.*

"Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 252 (1982) (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). "The trial court's function is to determine whether the evidence allows a 'reasonable inference' to be drawn as to the defendant's guilt of the crimes charged." *Id.* at 67, 296 S.E.2d 649, 296 S.E.2d at 652 (quoting *State v. Thomas*, 296 N.C. 236, 244-45, 250 S.E.2d 204, 209 (1978)). Any inference should be drawn in the light most favorable to the prosecution, and "contradictions and discrepancies do not warrant dismissal of the case—they are for the jury to resolve." *Id.* at 67, 296 S.E.2d at 653.

To survive a defendant's motion to dismiss for insufficient evidence, the State must offer substantial evidence of every element of the crime. *State v. Bethea*, 156 N.C. App. 167, 170-71, 575 S.E.2d 831, 834 (2003). The crime of obtaining property by false pretenses consists of the following elements: "(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another.'" *State v. Parker*, 354 N.C. 268, 284, 553 S.E.2d 885, 897 (2001) (quoting *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980)); see also N.C. Gen. Stat. § 14-100 (2003).

Viewed in the light most favorable to the State, the evidence indicates that the defendant drove to the homes of both Mr. Sain and Mrs. Grindstaff, telling each of them that his truck had broken down and that he needed money to tow it. After obtaining money from Mrs. Grindstaff for that purpose, promising to repay her, he sought to obtain money from Mr. Sain based on the same story. Defendant never repaid the money to Mrs. Grindstaff. From the evidence, the jury could infer that defendant's story was a fabrication by which he intended to deceive Mrs. Grindstaff and obtain money from her. Any evidence, whether direct, circumstantial, or both, suffices for the case to be sent to the jury, *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996), and any contradictions and discrepancies in the evidence were for the finder of fact to reconcile. *State v. Powell*, 299 N.C. 95, 101, 261 S.E.2d 114, 119 (1980). Therefore, the trial court did not err in denying the defendant's motion at the close of all the evidence.

Defendant also argues the trial court erred in sustaining the State's objections to evidence which he sought to present. He contends the evidence was relevant to the issues of the falsity of his statements and his intent to repay Mrs. Grindstaff.

Relevant evidence is admissible, except as specifically provided by law. N.C. Gen. Stat. § 8C-1, Rule 402 (2003). See also *State v. Streckfuss*, 171 N.C. App. 81, 88, 614 S.E.2d 323, 327 (2005). "'Relevant evidence' means 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 (2003). Our Supreme Court has "interpreted Rule 401 broadly and . . . [has] explained on a number of occasions that in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible." *State v. Collins*, 335 N.C. 729, 735, 440 S.E.2d 559, 562 (1994) (citations omitted).

"Evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue. In criminal cases, every circumstance that is calculated to throw any light upon the supposed crime is admissible. The weight of such evidence is for the jury." *State v. Smith*, 357 N.C. 604, 613-14, 588 S.E.2d 453, 460 (2003) (internal quotes and citations omitted).

The trial court must determine if the proposed evidence has "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 (2003). "[A] trial court's rulings on relevancy . . . are not discretionary and therefore are not reviewed under the abuse of discretion standard" *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991), *disc. review denied*, 331 N.C. 290, 416 S.E.2d 398 (1992), *cert denied*, 506 U.S. 915, 113 S.Ct. 321, 121 L. Ed. 2d 241 (1992) (citations omitted); *see State v. Fair*, 354 N.C. 131, 150, 557 S.E.2d 500, 515 (2001) (stating that jury should not be prohibited from hearing evidence that is "in any way connected with the matter in issue" or

evidence "from which any inference of the disputed fact can reasonably be drawn."); *State v. McCraw*, 300 N.C. 610, 618-19, 268 S.E.2d 173, 178 (1980) (same); *c.f. State v. Brown*, 350 N.C. 193, 209, 513 S.E.2d 57, 67 (1999) (stating, in dicta, that rulings on relevancy are subject to an abuse of discretion standard). Nevertheless, "such rulings are given great deference on appeal." *Wallace, supra.*; see *State v. Grant*, ___ N.C. App. ___, ___, 632 S.E.2d 258, 265 (2006); *State v. Oakley*, 167 N.C. App. 318, 320, 605 S.E.2d 215, 217 (2004); *State v. Mitchell*, 135 N.C. App. 617, 620, 522 S.E.2d 94, 96 (1999) (rulings on relevancy not discretionary).

Defendant attempted to introduce into evidence a one page GMAC insurance document listing defendant was the named insured on a policy covering a 1980 Chevrolet truck. He offered the exhibit to show his ownership of such a truck. The trial court excluded the exhibit. We conclude the relevance of the document to the issue of defendant's ownership of the truck was so attenuated that exclusion of the document was not error. The assignment of error directed to the exclusion of such evidence is overruled.

Defendant also argues that the trial court erred in allowing neither himself nor his father to testify about alleged conversations they had the evening of 19 April relating to repayment of the money to Mrs. Grindstaff. "[I]n order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the

significance of the evidence is obvious from the record.” *State v. Golphin*, 352 N.C. 364, 462, 533 S.E.2d 168, 231 (2000) (citations omitted). In the instant case, defendant made no offer of proof with respect to the senior Mr. Parker’s potential testimony, and the substance of his testimony is made apparent only from the representations in defendant’s brief and not from the record. Accordingly, defendant has not preserved this issue for review, and we do not address it.

Defendant assigns error to the trial court’s ruling sustaining the State’s objection to testimony which defendant’s counsel sought to elicit from defendant concerning his state of mind at the time of the alleged offense. Defendant made no offer of proof at trial. However, in *Golphin*, 352 N.C. at 462, 533 S.E.2d at 231, our Supreme Court held that a specific offer of proof was not required where the significance of the evidence was obvious from the record.

See State v. Hamilton, 351 N.C. 14, 19, 519 S.E.2d 514, 518 (1999) (“Although the record does not contain an offer of what . . . [the witnesses’] response might have been to defendant’s proposed question, the significance of the evidence is obvious . . .”).

In the present case, the record shows that the defendant attempted to testify that the day after he took the money from Mrs. Grindstaff, he talked to his father, who told him that he would take the money to Mrs. Grindstaff. The State’s objection to this testimony and to defendant’s testimony with respect to his intent at the time he accepted the money from her, was sustained. Even in the absence of a formal offer of proof, the context of the

testimony, combined with the start of the defendant's answer before he was cut off by the trial court made the "substance of the [excluded] evidence . . . apparent." N.C. Gen. Stat. § 8C-1, Rule 103(a) (2) (2003).

In order to convict the defendant of obtaining property by false pretenses, the State was required to prove, *inter alia*, "(1) a false representation of a subsisting fact or a *future fulfillment or event*" *State v. Ledwell*, 171 N.C. App. 314, 317, 614 S.E.2d 562, 565 (2005) (emphasis added). In other words, the defendant must have falsely represented his *contemporaneous* intent - his intent at the time of making the false representation. In these circumstances, defendant's state of mind at the time of the allegedly false representation was relevant and the trial court erred in not permitting the defendant to testify to his state of mind, because it goes to the heart of the criminal conduct. See N.C. Gen. Stat. § 14-100(b) (2003) ("Evidence of nonfulfillment of a contract obligation standing alone shall not establish the essential element of intent to defraud.").

Having found error, we must next determine whether such error was prejudicial. The first step is classifying the nature of the error. The defendant argues that the restriction of his testimony violates his Due Process rights, his Confrontation Clause rights, and his right to counsel under both the North Carolina and United States Constitutions. However, he did not raise constitutional issues at the trial court level. As a result, the trial court could not consider and correct the purported error. Since "it is

well settled that constitutional matters that are not raised and passed upon at trial will not be reviewed for the first time on appeal", *State v. Garcia*, 358 N.C. 382, 420, 597 S.E.2d 724, 750 (2004), we cannot consider the defendant's constitutional arguments and must address any errors as mistakes in evidentiary rulings.

The burden is on the defendant to prove that a trial error not arising from rights vested under the Constitution of the United States is prejudicial. N.C. Gen. Stat. § 15A-1443(a) (2003); see also *State v. Hyman*, 153 N.C. App. 396, 402, 570 S.E.2d 745, 749 (2002). Prejudice is shown when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial. *State v. Allen*, 353 N.C. 504, 509, 546 S.E.2d 372, 375 (2001); N.C. Gen. Stat. § 15A-1443(a) (2003); see also *State v. Millsaps*, 169 N.C. App. 340, 347, 610 S.E.2d 437, 442 (2005).

We examine the exclusion of defendant's testimony with respect to his thought processes at the time of the alleged offense against this backdrop. The pivotal issue in this case was whether the defendant made a false statement to Mrs. Grindstaff with the intention of defrauding her. The State showed that the defendant obtained \$30.00 from Mrs. Grindstaff by telling her his truck had broken down. The State also showed that the defendant then went to another house and repeated the same story, seeking additional money under the same guise. Under these circumstances, which were unrefuted, defendant cannot show that the exclusion of his self-serving statement that he intended to repay Mrs. Grindstaff had a

probable impact on the jury's verdict. N.C. Gen. Stat. § 15A-1443(a). Therefore, any error in excluding the testimony was not prejudicial and does not warrant a new trial.

No Prejudicial Error.

Judges ELMORE and JACKSON concur.

Report per Rule 30(e).