NO. COA09-1650

NORTH CAROLINA COURT OF APPEALS

Filed: 6 July 2010

STATE OF NORTH CAROLINA

v. Martin County
No. 08 CRS 50137-39

SHIRLEY DENISE WIGGINS

Appeal by Defendant from judgment entered 20 May 2009 by Judge Quentin T. Sumner in Superior Court, Martin County. Heard in the Court of Appeals 25 May 2010.

Attorney General Roy Cooper, by Assistant Attorney General Brent D. Kiziah, for the State.

Kimberly P. Hoppin, for Defendant-appellant.

WYNN, Judge.

"A verdict is deemed sufficient if it 'can be properly understood by reference to the indictment, evidence and jury instructions.'"[1] In the present case, Defendant Shirley Denise Wiggins argues that her right to an unanimous verdict was violated when the jury was not instructed on each element of obtaining property by false pretenses for each of three separately identifiable offenses charged. Because the record supports the

[1]*State v. Wiggins*, 161 N.C. App. 583, 592, 589 S.E.2d 402, 409 (2003)(quoting *State v. Connard*, 81 N.C. App. 327, 336, 344 S.E.2d 568, 574 (1986), *aff'd per curiam*, 319 N.C. 392, 354 S.E.2d 238 (1987)), *disc. review denied*, 358 N.C. 241, 594 S.E.2d 34 (2004).

conclusion that there was no danger of a lack of unanimity in Defendant's verdict, we find no error in Defendant's trial.

At trial, the State's evidence tended to show the following: On 27 March 2007, Defendant called her nephew Toby Draughn and told him how he could get some money. Defendant met Draughn and she gave him a check, payable to him, that appeared to be a payroll check from Williamston Yarn Mill in the amount of $742.10. Although he had never been employed at Williamston Yarn Mill, Draughn cashed the check at Fida Mart and gave Defendant half of the money. The check was later returned to Fida Mart as invalid.

On 29 March 2007, Defendant met Draughn at Piggly Wiggly and gave him another payroll check made out to him from Williamston Yarn Mill in the amount of $560.44. Draughn cashed the check at Piggly Wiggly and gave Defendant half of the money. The check was later returned to Piggly Wiggly as invalid.

On that same day, Defendant met her niece Rinita Latimer at Piggly Wiggly. Defendant gave Latimer a check payable to Latimer that appeared to be from Williamston Yarn Mill in the amount of $560.44. Like Draughn, Latimer had never been employed by Williamston Yarn Mill; however, she cashed the check at Piggly Wiggly and gave Defendant half of the money. The check was later returned to Piggly Wiggly as invalid.[2]

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[2]The State also presented evidence of a similar transaction involving Defendant and one Joyce Outlaw at the same Piggly Wiggly on the same day, 29 March 2007. This fourth transaction did not form the basis of any of Defendant's three convictions in this matter.

Following these transactions, Draughn and Latimer were arrested for obtaining property by false pretenses, forgery, and uttering a forged instrument. Both told police that Defendant had provided them with the checks they had cashed.

Defendant did not present any evidence at trial. The jury convicted Defendant of three counts of obtaining property by false pretenses. At the sentencing phase of the hearing, Defendant expressed to the trial court some confusion regarding her right to testify. The trial court responded that this was a matter between Defendant and her attorney. Defendant appeals.

On appeal, Defendant argues that (I) she was provided ineffective assistance of counsel ("IAC"); and that the trial court erred by: (II) denying Defendant's motion to dismiss where the State failed to produce sufficient evidence of each element of the offense charged, and (III) failing to instruct the jury properly on each element of the offenses charged for each separately identifiable offense.

I

Defendant first argues that she was provided ineffective assistance of counsel.[3]

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[3]Defendant also argues that the trial court committed reversible error in failing to inquire further into Defendant's assertion that she did not understand her rights to testify, to present witnesses in her defense, and to cross-examine the State's witnesses. However, Defendant does not pursue this allegation in her brief, but instead couches her argument entirely in terms of her IAC claim. Consequently we consider the argument that the trial court erred in failing to inquire into Defendant's assertion that she did not understand her trial rights as abandoned. N.C. R. App. P. 28(b)(6) (2010).

To establish ineffective assistance of counsel, our Supreme Court has held that a defendant must prove (1) her counsel's performance was deficient and (2) that her defense was thereby prejudiced. *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985)(quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, *reh'g denied*, 467 U.S. 1267, 82 L. Ed. 2d 864 (1984)). This Court has held that "[a] defendant's ineffective assistance of counsel claim may be brought on direct review 'when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing.'" *State v. Pulley*, 180 N.C. App. 54, 69, 636 S.E.2d 231, 242 (2006)(quoting *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001), *cert. denied*, *Fair v. North Carolina*, 535 U.S. 1114, 153 L. Ed. 2d 162, (2002)), *disc. review denied*, 361 N.C. 574, 651 S.E.2d 375-76 (2007). However, "[i]f an ineffective assistance of counsel claim is prematurely brought, this Court may dismiss the claim without prejudice, allowing the defendant to reassert the claim during a subsequent motion for appropriate relief proceeding." *Id.*

In the present case, after the jury returned the verdict, the trial court asked Defendant directly if she had anything to say. Defendant asserted that she did not know that she could cross-examine people; that she had some witnesses present that did not testify; and that she did not know that not testifying would hurt her case. Defendant now asserts that this exchange indicates that

her counsel was ineffective because Defendant's waiver of her right to testify and right to present witnesses may not have been voluntary and knowing.

"It is not the intention of this Court to deprive criminal defendants of their right to have IAC claims fully considered. Indeed, because of the nature of IAC claims, defendants likely will not be in a position to adequately develop many IAC claims on direct appeal." *Fair*, 354 N.C. at 167, 557 S.E.2d at 525. The record before us is insufficient to determine whether there is merit to Defendant's claim. We therefore dismiss Defendant's IAC claim, without prejudice to Defendant's right to file a motion for appropriate relief in the superior court based on an allegation of IAC. *See State v. Long*, 354 N.C. 534, 540, 557 S.E.2d 89, 93 (2001)(recognizing the need for the development of evidentiary issues before defendant will be in position adequately to raise an IAC claim).

II

Defendant next argues that the trial court erred in denying her motion to dismiss the charges against her.

The test of the sufficiency of the evidence in a criminal case is "whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* On review, the evidence must be viewed "in the

light most favorable to the State, giving the State the benefit of all reasonable inferences" that can be drawn from the evidence. *State v. Fritsch*, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, *Fritsch v. North Carolina*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

Our Supreme Court enumerated the elements of obtaining property by false pretenses in *State v. Cronin*, 299 N.C. 229, 262 S.E.2d 277 (1980). The Court there stated,

> the crime of obtaining property by false pretenses pursuant to G.S. 14-100 should be defined as follows: (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.

Id. at 242, 262 S.E.2d at 286.

In the present case, the jury was instructed on the theory of acting in concert.

> To be convicted of a crime under the theory of acting in concert, the defendant need not do any particular act constituting some part of the crime. [*State v. Moore*, 87 N.C. App. 156, 159, 360 S.E.2d 293, 295 (1987), *disc. review denied*, 321 N.C. 477, 364 S.E.2d 664 (1988).] All that is necessary is that the defendant be "present at the scene of the crime" and that he "act[] together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *Id.* at 159, 360 S.E.2d at 295-96.

State v. Lundy, 135 N.C. App. 13, 18, 519 S.E.2d 73, 78 (1999), *appeal dismissed, disc. review denied*, 351 N.C. 365, 542 S.E.2d 651 (2000). "For purposes of the [acting in concert] doctrine, '[a]

person is constructively present during the commission of a crime if he or she is close enough to be able to render assistance if needed and to encourage the actual perpetration of the crime.'" *State v. Mann*, 355 N.C. 294, 306, 560 S.E.2d 776, 784 (2002) (quoting *State v. Willis*, 332 N.C. 151, 175, 420 S.E.2d 158, 169 (1992)), *cert. denied*, *Mann v. North Carolina*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002).

Defendant here argues that the State presented insufficient evidence that Defendant was present at the Fida Mart, or that she and Draughn acted with a common plan or purpose when he cashed the check there. Defendant argues moreover that the State presented insufficient evidence that Defendant and Draughn, or Defendant and Latimer, acted with a common plan or purpose when Draughn and Latimer cashed checks at Piggly Wiggly.

Defendant notes that no testimony was presented of how Defendant came into possession of the checks. But the State was not required to present such evidence where the property allegedly obtained was the proceeds of the worthless checks, not the checks themselves. *See State v. Cagle*, 182 N.C. App. 71, 75, 641 S.E.2d 705, 708 (2007)("passing a worthless check in order to obtain property will suffice to uphold a conviction for obtaining property by false pretenses."). Defendant notes that no testimony was presented that Defendant knew that Draughn or Latimer would not be entitled to the proceeds of the checks. But Draughn testified that he knew he was committing fraud, and the State demonstrated that Defendant was involved in that transaction. Significantly,

regarding the transactions by Draughn and Latimer, the evidence presented by the State yields a strong inference that Defendant knew the nature of her acts. *See State v. Bennett*, 84 N.C. App. 689, 691, 353 S.E.2d 690, 692 (1987)(for purposes of N.C. Gen. Stat. § 14-100, intent to deceive "must ordinarily be proved by circumstances from which it may be inferred.")

Defendant notes that no direct evidence was presented of an agreement between Defendant and Draughn or Latimer to divide the proceeds of the checks. Notwithstanding, the fact that Defendant provided the checks and received a portion of the money is circumstantial evidence of such a scheme. *See id.*; *State v. Clark*, 137 N.C. App. 90, 96, 527 S.E.2d 319, 322 (2000)("Although there is no direct evidence of an agreement between defendant and [another], reasonable inferences from the circumstantial evidence support the conviction.")

Finally, Defendant notes that there was no testimony presented that Defendant was present at the Fida Mart or that she told Draughn to go inside. But the State was not required to prove Defendant's actual presence at the scene of the crime. Rather, the State presented sufficient evidence of Defendant's constructive presence. *See State v. White*, 131 N.C. App. 734, 742, 509 S.E.2d 462, 467 (1998)(constructive presence established when defendant knew of actual perpetrator's intent to rob when he left him and shortly afterwards received a portion of the proceeds of the robbery); *State v. Wiggins*, 16 N.C. App. 527, 530, 192 S.E.2d 680, 682 (1972)("the actual distance of a person from the place where a

crime is perpetrated is not always material in determining whether the person is constructively present.").[4]

Viewing the evidence in the light most favorable to the State, and granting the State the benefit of all reasonable inferences (as we are required to do), we hold that the State presented sufficient evidence of each element of the offense charged to withstand Defendant's motion to dismiss.

III

Defendant next argues that the trial court erred in failing properly to instruct the jury on each element of obtaining property by false pretenses for each separately identifiable offense. Defendant concedes she did not object to the jury instruction offered at trial.

> As a general rule, defendant's failure to object to alleged errors by the trial court operates to preclude raising the error on appeal.

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[4]The State argues on appeal that Defendant's conviction can be sustained on a theory of aiding and abetting, citing *State v. Bond*, 345 N.C. 1, 24, 478 S.E.2d 163, 174-75 (1996)(defendant may be found guilty under theory of aiding and abetting absent a showing of actual or constructive presence), *cert. denied*, *Bond v. North Carolina*, 521 U.S. 1124, 138 L. Ed. 2d. 1022 (1997). In her reply brief, Defendant notes that the jury here was not instructed on aiding and abetting. Defendant argues that despite those cases that have assimilated the theories, they remain separate and distinct. *See State v. Bonnett*, 348 N.C. 417, 440, 502 S.E.2d 563, 578 (1998) (citing *State v. Williams*, 299 N.C. 652, 656, 263 S.E.2d 774, 777 (1980)), *cert. denied*, *Bonnett v. North Carolina*, 525 U.S. 1124, 142 L. Ed. 2d 907 (1999). Unlike aiding and abetting, acting in concert requires a showing of defendant's actual or constructive presence. *Mann*, 355 N.C. at 306, 560 S.E.2d at 784. We need not address the issue of whether Defendant's conviction can be sustained on the theory of aiding and abetting where the trial court only instructed on the theory of acting in concert because the State's evidence of Defendant's acting in concert was sufficient to survive Defendant's motion to dismiss.

> Where, however, the error violates defendant's right to a trial by a jury of twelve, defendant's failure to object is not fatal to his right to raise the question on appeal.

State v. Ashe, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) (citations omitted); *see also State v. Brewer*, 171 N.C. App. 686, 691, 615 S.E.2d 360, 363 (2005)(applying the above rule to defendant's argument that jury instructions violated his right to a unanimous verdict), *disc. review denied*, 360 N.C. 484, 632 S.E.2d 493 (2006). Moreover, "[o]ur state constitution provides that '[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court.'" *State v. Petty*, 132 N.C. App. 453, 460, 512 S.E.2d 428, 433 (1999)(quoting N.C. Const. art. 1, § 24; and citing N.C.G.S. § 15A-1237(b) (1997) (requiring unanimous jury verdicts)), *appeal dismissed, review denied*, 350 N.C. 598, 537 S.E.2d 490 (1999).

In the present case, Defendant argues that the trial court's single instruction on obtaining property by false pretenses failed to set out dates certain for the three separate offenses, failed to set out a certain amount of U.S. currency for each offense, and failed to set out that Defendant must be found to have acted in concert on each separate occasion. Defendant argues that the instruction in this case thus posed the risk of a non-unanimous verdict on each separately identifiable offense.

"A fatally ambiguous jury instruction violates a defendant's constitutional right to a unanimous verdict." *State v. Haddock*, 191 N.C. App. 474, 480, 664 S.E.2d 339, 344 (2008). *Haddock*

recognized that the seminal cases defining this issue are *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986), and *State v. Hartness*, 326 N.C. 561, 569, 391 S.E.2d 177, 182 (1990).[5] Our Supreme Court held that the jury instructions in *Diaz* were improper "because they allowed the jury to convict the defendant if they found that he either possessed or transported drugs. Such an instruction was erroneous because the drug trafficking statute enumerated specific activities, each of which was punishable separately." *State v. Almond*, 112 N.C. App. 137, 144, 435 S.E.2d 91, 95 (1993).[6]

"There is no risk of a [non-unanimous] verdict, however, where the statute under which the defendant is charged criminalizes 'a single wrong' that 'may be proved by evidence of the commission of any one of a number of acts . . . ; [because in such a case] the particular act performed is immaterial.'" *Petty*, 132 N.C. App. at 460, 512 S.E.2d at 433 (quoting *Hartness*, 326 N.C. at 566-67, 391 S.E.2d at 180). In *Almond*, this Court held that N.C. Gen. Stat. § 14-100 (making it a crime to obtain property by false pretenses) establishes a single wrong and does not "enumerate any specific

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[5]*Diaz* overruled *State v. Foust*, 311 N.C. 351, 317 S.E.2d 385 (1984). *See Diaz*, 317 N.C. at 555, 346 S.E.2d at 495. This overruling was abrogated by *Hartness*. *See Hartness*, 326 N.C. at 566, 391 S.E.2d at 180. Otherwise *Diaz* remains binding precedent. *See id.* at 565-66, 391 S.E.2d at 180 (distinguishing *Diaz*); *see also State v. Funchess*, 141 N.C. App. 302, 307-09, 540 S.E.2d 435, 438-39 (2000) (discussing differences between *Diaz* and *Hartness* lines of precedent).

[6]Defendant relies on *State v. Johnson*, 177 N.C. App. 565, 629 S.E.2d 623 (2006)(unpublished) without clarifying its status or providing us a copy, as required by our Rules of Appellate Procedure. Our Rules explain that "[a]n unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority." N.C. R. App. P. 30(e)(3) (2010).

activities which are separately punishable." *Almond*, 112 N.C. App. at 145, 435 S.E.2d at 96. Therefore, there is no risk of a non-unanimous verdict – in the sense contemplated by *Diaz* – in the present case.

We observe that Defendant's argument depends not on a potential lack of unanimity in the nature of the offense charged, but on the multiplicity of the charges. Defendant asserts, for example, that it is not clear which party the jury may have determined Defendant acted in concert with on each occasion. Defendant contends that the instruction did not make clear that each offense was a separate event, requiring a separate finding of acting in concert and misrepresentation.

"A verdict is deemed sufficient if it 'can be properly understood by reference to the indictment, evidence and jury instructions.'" *State v. Wiggins*, 161 N.C. App. 583, 592, 589 S.E.2d 402, 409 (2003)(quoting *State v. Connard*, 81 N.C. App. 327, 336, 344 S.E.2d 568, 574 (1986), *aff'd per curiam*, 319 N.C. 392, 354 S.E.2d 238 (1987)).

In the present case, Defendant was indicted on three counts of obtaining property by false pretenses. The indictments each contained the alleged date of the offense, victim of the crime, and accomplice. At trial, the State presented evidence to support each of the indictments. After instructing the jury on the elements of obtaining property by false pretenses, the trial court explained:

> Ladies and gentlemen, I'll point out to you again that there are three counts of Obtaining Property by False Pretense. There are three verdict sheets for you to indicate your

> unanimous verdict on those verdict sheets. I've only instructed you one time, but the law applies as I've given it to you in each and every case, for each and every charge in this case.

The verdict sheets distributed to the jury each contained the alleged date of the offense, victim of the crime, and amount of the check.

After receiving the jury instructions and verdict sheets, the jury did not have any questions or express any confusion. *See State v. Reber*, 182 N.C. App. 250, 256, 641 S.E.2d 742, 747, (noting, among other circumstances indicative of unanimity, that the jury never questioned or exhibited any confusion), *disc. review denied*, 361 N.C. 701, 653 S.E.2d 155 (2007). The jury returned a verdict finding Defendant guilty of each of the three counts charged. *See Wiggins*, 161 N.C. App. at 593, 589 S.E.2d at 409 (no danger of a lack of unanimity where defendant was convicted of all seven charges). In light of these circumstances, we hold that there was no danger of a lack of unanimity among the jurors with respect to the verdict.

Dismissed in part; no error in part.

Judges ROBERT C. HUNTER and CALABRIA concur.

Report per Rule 30(e).