

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA09-1680

NORTH CAROLINA COURT OF APPEALS

Filed: 20 July 2010

STATE OF NORTH CAROLINA

v.

Pitt County  
Nos. 07 CRS 61341-43

TIYANA MICHELLE JOYNER

Appeal by defendant from judgments entered 20 March 2009 by Judge W. Russell Duke, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 19 July 2010.

*Attorney General Roy Cooper, by Assistant Attorney General Phillip K. Woods, for the State.*

*John Keating Wiles for defendant.*

BRYANT, Judge.

Tiyana Michelle Joyner ("defendant") appeals from judgments dated 20 March 2009 and entered pursuant to a jury verdict finding her guilty of three counts of embezzlement. As discussed below, we find no error.

The State's evidence tended to show that defendant was employed by the Golden Living Center, a nursing home in Greenville. Defendant was initially hired as a receptionist, but her responsibilities increased to include handling patient payments, depositing those payments in the bank, maintaining the records of the payments and deposits at the nursing home, and sending copies

of the checks, receipts and deposit slips to the nursing home's central billing office. Further testimony tended to show that over the course of several months in 2007, defendant embezzled at least \$1,412.00 from the nursing home.

Defendant's sole argument on appeal is that the trial court's instructions to the jury amounted to a directed verdict on one element of embezzlement. We disagree.

When "instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence." N.C. Gen. Stat. § 15A-1232 (2009). On appeal, this Court examines the totality of the circumstances when evaluating whether a trial court impermissibly expressed an opinion on the evidence at trial and whether the alleged opinion could reasonably have affected the jury's verdict. *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995). Moreover, "[w]here the instructions to the jury, taken as a whole, present the law fairly and clearly to the jury, we will not find error even if isolated expressions, standing alone, might be considered erroneous." *State v. Morgan*, 359 N.C. 131, 165, 604 S.E.2d 886, 907 (2004).

While instructing the jury in this case, the trial court stated, in pertinent part:

The defendant has been charged with three counts of embezzlement. Embezzlement occurs when a person with fiduciary duties rightfully receives property in the role as a receptionist with bookkeeping duties and then intentionally, fraudulently, and dishonestly

uses that property for some purpose other than that for which the defendant received it.

For you to find the Defendant guilty of this offense, the State must prove three things beyond a reasonable doubt.

First, that the defendant was a receptionist with bookkeeping duties of the victim. She was a receptionist of the victim with bookkeeping duties.

Second, that while acting as the victim's receptionist with bookkeeping duties, the defendant rightfully received money in the form of checks and cash.

And third, that the defendant intentionally, fraudulently and dishonestly used the money for some purpose other than that for which i[t] was received.

Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. You arrive at the intent of a person by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw therefrom.

So, ladies and gentlemen, if you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant rightfully received money in the form of checks and cash as a receptionist with bookkeeping duties of the victim and that the defendant intentionally, fraudulently and dishonestly used the money for some purpose other than that for which it was received, it would be your duty to return a verdict of guilty.

If you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

Defendant argues that the trial court's statement that she "was a receptionist of the victim with bookkeeping duties," constitutes an

opinion by the trial court that the State had proven defendant was a receptionist of the victim with bookkeeping duties, directing a verdict as to the first element of embezzlement. The elements of embezzlement are: (1) the defendant was the agent of the prosecutor, and (2) by the terms of his employment had received property of his principal; (3) that he received it in the course of his employment; and (4) knowing it was not his own converted it to his own use. *State v. Block*, 245 N.C. 661, 663, 97 S.E.2d 243, 244 (1957).

We hold that the statement at issue was not an expression of opinion nor a direction to the jury that it must find that defendant was a receptionist of the victim with bookkeeping duties. The trial court instructed the jury that the State must prove, "[f]irst, that the defendant was a receptionist with bookkeeping duties of the victim." Later, the trial court reiterated that the State must prove that "the defendant rightfully received money in the form of checks and cash as a receptionist with bookkeeping duties of the victim . . . ." Accordingly, taken as a whole, the trial court's instructions to the jury fairly and clearly stated the law and were not error.

No error.

Judges HUNTER, Robert C., and STEELMAN concur.

Reported per Rule 30(e).