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NO. COA09-211

NORTH CAROLINA COURT OF APPEALS

Filed: 6 October 2009

STATE OF NORTH CAROLINA

v.

Wayne County  
No. 04 CRS 51209

DELILAH DICKERSON

Appeal by defendant from judgments entered 26 June 2008 by Judge Benjamin G. Alford in Wayne County Superior Court. Heard in the Court of Appeals 2 September 2009.

*Attorney General Roy A. Cooper, III, by Assistant Attorney General David D. Lennon, for the State.*

*Michael J. Reece, for defendant-appellant.*

JACKSON, Judge.

Delilah Dickerson ("defendant") appeals from convictions for one count of embezzlement of less than \$100,000.00 and twenty-two counts of corporate malfeasance. For the reasons stated below, we hold no error as to the denial of defendant's motion to dismiss the charge of embezzlement and charges of corporate malfeasance.

In May 2001, defendant began working at Pate-Dawson Company ("Pate-Dawson"), a corporation in the food distribution business, as an accounts receivable clerk. Defendant's job entailed reconciling deposits received from drivers with the amounts that

were supposed to be collected from customers. Defendant handled all of the deposits that came into the warehouse. She collected the money from the safe and counted it. Occasionally customers who worked from charge accounts or who were billed for food that had been delivered paid the driver directly, a practice referred to as "paid on account." This practice often resulted in drivers bringing in more money than they were scheduled to collect.

Defendant allocated "paid on account" money collected and payments received by mail to individual customer accounts. The allocation process involved opening the company software system and applying the funds received to the corresponding customer accounts.

Defendant also filled out deposit slips for different classes of payments. At the end of each shift, defendant documented the transactions, preparing an end-of-shift register electronically. Each end-of-shift register indicated the username of the person who had prepared it. Accounts receivable clerks could not access a computer without entering their user name and password. After defendant completed the deposits, she gave them to the credit manager who placed them into a safe. During lunchtime, the controller deposited the money at the bank.

In January 2004, after Pate-Dawson's controller Lee Joyner ("Joyner") noticed several problems with bank reconciliations for accounts handled by defendant, Pate-Dawson terminated defendant's employment. Shortly thereafter, Joyner began looking through defendant's accounting registers and noticed irregularities, including negative entries dating back to 2002. On 27 January

2007, Pate-Dawson filed a report with the Wayne County Sheriff's Department regarding missing cash, which implicated defendant. After obtaining a search warrant, Detective Mike Dale ("Detective Dale") and another officer searched defendant's home and found numerous stacks of paper bearing Pate-Dawson accounting information. Among the items were carbon copies of deposit slips, photocopies of checks, check-in sheets, cash receipt registers, and "paid on account" logs. Pate-Dawson company policy forbade accounts receivable clerks from taking such paperwork home.

Around June 2004, Special Agent Robin Todd ("Special Agent Todd") of the Financial Crimes Division of the State Bureau of Investigation reviewed four banker boxes of records generated by defendant while she was employed by Pate-Dawson. The records showed \$103,552.40 in cash that was received by defendant, but did not appear on any deposit slips to the bank. In one instance, a "paid on account" deposit was \$6,000.00 short. The corresponding driver check-in deposit was correct in amount, but was short \$6,000.00 in cash, and the difference was made up by a \$6,000.00 check that belonged in the paid on account deposit instead of the driver check-in deposit. Another register showed that defendant, without authorization, had applied bank credits to customer accounts that should not have been credited. Altogether, Special Agent Todd identified forty-five instances where there appeared to be variances between the registers and corresponding deposits. Further records indicated negative "chargebacks" on an inactive account in the name of the Johnston County Schools. Defendant was

not authorized to use chargebacks to handle credits. The effect of the negative entries generated by defendant was to lower the totals reflected on her register, allowing her to remove cash without its showing on the register she submitted to Pate-Dawson. In total, negative entries appeared in "paid on account" registers on more than 100 days.

Between August 2002 and January 2004, defendant deposited \$59,660.00 in cash into her bank account, \$56,060.00 of which was deposited in 2003. However, defendant's 2003 tax return showed only \$20,944.00 in wages. On 4 September 2007, defendant was indicted on one count of embezzlement, in violation of North Carolina General Statutes, section 14-90 and twenty-two counts of corporate malfeasance, in violation of North Carolina General Statutes, section 14-254.

On 23 June 2006, defendant's case came on for trial. At the close of all evidence, defendant made a general motion to dismiss without offering an argument in support thereof. The trial court denied defendant's motion, and a jury subsequently found defendant guilty of one count of embezzlement of an amount less than \$100,000.00 and twenty-two counts of corporate malfeasance. On 26 June 2008, the trial court sentenced defendant to twelve consecutive terms of eight to ten months imprisonment. On 30 June 2008, defendant filed written notice of appeal.

On appeal defendant argues that evidence of fraudulently or knowingly and willfully converting money did not rise beyond the

level of suspicion and conjecture to the level of real and substantial evidence. We disagree.

In order to survive a motion to dismiss based upon the sufficiency of the evidence, the State must present substantial evidence of each essential element of the charged offense, or of a lesser offense included therein, and of defendant's being the perpetrator of the offense. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence" is relevant evidence, which a reasonable mind would accept as sufficient to support a conclusion. *State v. Patterson*, 335 N.C. 437, 449-50, 439 S.E.2d 578, 585 (1994). However, evidence is not substantial if it arouses only a suspicion about the fact to be proven, even if the suspicion is strong. *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983) ("If . . . the evidence . . . is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed.") (citing *State v. Poole*, 285 N.C. 108, 119, 203 S.E.2d 786, 793 (1974)). The court must consider all of the evidence admitted in the light most favorable to the State, giving the State the benefit of every reasonable inference. *Fritsch*, 351 N.C. at 378-79, 526 S.E.2d at 455. "The defendant's evidence, unless favorable to the State, is not to be taken into consideration." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982). "If there is more than a scintilla of competent evidence to support allegations in the warrant or indictment, it is

the court's duty to submit the case to the jury." *State v. Everhardt*, 96 N.C. App. 1, 11, 384 S.E.2d 562, 568 (1989), *aff'd*, 326 N.C. 777, 392 S.E.2d 391 (1990) (quoting *State v. Horner*, 248 N.C. 342, 344-45, 103 S.E.2d 694, 696 (1958)). It is ultimately a jury's job to resolve contradictions and discrepancies in the evidence and make the final determination as to defendant's guilt. *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455.

Defendant was convicted of embezzlement pursuant to North Carolina General Statutes, section 14-90. Section 14-90 sets forth three requirements that the state must prove:

- (1) that the defendant, being more than sixteen years of age, acted as an agent or fiduciary for his principal,
- (2) that he received money or valuable property of his principal in the course of his employment and by virtue of his fiduciary relationship, and
- (3) that he fraudulently or knowingly and willfully misapplied or converted to his own use such money or valuable property of his principal which he had received in his fiduciary capacity.

*State v. Rupe*, 109 N.C. App. 601, 608, 428 S.E.2d 480, 485 (1993) (citing *State v. Kornegay*, 313 N.C. 1, 21, 326 S.E.2d 881, 896 (1985); *State v. Earnest*, 64 N.C. App. 162, 163-64, 306 S.E.2d 560, 562 (1983), *disc. rev. denied*, 310 N.C. 746, 315 S.E.2d 705 (1984)). The State may prove its case either by direct evidence of intent or by showing such facts and circumstances from which such intent reasonably may be inferred. *State v. McLean*, 209 N.C. 38, 40, 182 S.E. 700, 701-02 (1935).

In the case *sub judice*, it is undisputed that defendant was employed by Pate-Dawson as an accounts receivable clerk; therefore

she was acting as an agent for her fiduciary. Because she was born 22 December 1959, defendant clearly had attained the age of sixteen well before the events at issue. On a daily basis, defendant handled all the deposits that came into the warehouse and collected all the money from the safe. Simply stated, defendant was entrusted with money, which belonged to her employer. As a result, defendant does not contest elements one and two of embezzlement.

As to the third element, it is not necessary to show that defendant converted the property to her own use. *Rupe*, 109 N.C. App. at 609, 428 S.E.2d at 486 (citing *State. v. Melvin*, 86 N.C. App. 291, 298, 357 S.E.2d 379, 384 (1987)). The State need only "show[] defendant fraudulently or knowingly and willfully misapplied the property for purposes other than those for which [s]he received it as agent or fiduciary." *Id.* Furthermore, the State can show defendant's intent to defraud through facts and circumstances from which intent reasonably may be inferred. *State v. Thompson*, 50 N.C. App. 484, 487, 274 S.E.2d 381, 384, *disc. rev. denied*, 302 N.C. 633, 280 S.E.2d 448 (1981). It is not necessary that the evidence exclude every reasonable hypothesis of innocence for the trial court to deny the motion to dismiss. *See Earnhardt*, 307 N.C. at 67, 296 S.E.2d at 652.

The State's evidence clearly established that defendant generated chargebacks to various customer accounts, some of which were inactive. Defendant lacked the authority to apply chargebacks to these accounts. The chargebacks allowed cash to be removed without its showing in the company's accounting documentation.

Defendant never reported any inconsistencies in her accounts to her supervisor. The sheriff's department seized a number of deposit slips and Pate-Dawson accounting documents from defendant's house. Special Agent Todd reviewed the records and observed over 100 days with negative entries on "paid on account" logs. Defendant's personal folder reflected numerous cash deposits to defendant's personal account. One month, these cash deposits were triple the amount of defendant's monthly salary deposit. Defendant's personal checking account disclosed cash deposits in 2003, over and above her salary, in the amount of \$56,060.00. Defendant's federal income tax return for 2003 did not disclose any income other than her salary.

Additionally, in the instant case, defendant's testimony favored the State in several respects, and therefore, those portions may be considered by the trial court when ruling upon defendant's motion to dismiss. See *Earnhardt*, 307 N.C. at 67, 296 S.E.2d at 652 ("The defendant's evidence, unless favorable to the State, is not to be taken into consideration.") (citing *State v. Jones*, 280 N.C. 60, 66, 184 S.E.2d 862, 866 (1971)). Defendant admitted that she had been convicted of forgery and served ten years imprisonment in Maryland. She also admitted that she had not told Pate-Dawson about the conviction. Furthermore, defendant testified that she had told her employment agency about the conviction, but her application to the agency revealed that she had falsely stated that she had never been convicted of a felony. Although "evidence of other crimes, wrongs, or acts is not



admissible to prove the character of a person . . . it may . . . be admissible for other purposes, such as proof of motive, opportunity, [or] intent . . . ." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2007). Here, defendant's failure to disclose her prior conviction could be used by the State to prove defendant's intent.

Accordingly, we hold that the State presented substantial evidence of defendant's fraudulent or knowing and willful misapplication or conversion of money. The State's evidence and the logical inferences that flow from it, considered in the light most favorable to the State, support the conclusion that a rational trier of fact could have found the essential elements of embezzlement beyond a reasonable doubt. See *Earnhardt*, 307 N.C. at 67, 296 S.E.2d at 652. The trial court did not err in denying defendant's motion to dismiss the embezzlement charge.

Next, defendant challenges her conviction for twenty-two counts of corporate malfeasance under North Carolina General Statutes, section 14-254. Defendant argues that evidence of a fraudulent intent was lacking because defendant admitted to making the entries in question and expressly denied doing it for any dishonest purpose. We disagree.

North Carolina General Statutes, section 14-254 provides:

(a) If any president, director, cashier, teller, clerk or agent of any corporation shall . . . make any false entry in any book, report or statement of the corporation with the intent . . . to injure or defraud or to deceive any person, . . . he shall be punished as a class H felon.

(b) For purposes of this section, "person" means a natural person, association,

consortium, corporation, body politic,  
partnership, or other group, entity, or  
organization.

N.C. Gen. Stat. § 14-254 (2007). Since the crimes of embezzlement and corporate malfeasance have different elements, one may be convicted of both offenses based upon a single act or series of acts. *State v. Kornegay*, 313 N.C. 1, 20-22, 326 S.E.2d 881, 896-97 (1985) (holding that the statutes represent two separate and distinct offenses).

In the case *sub judice*, defendant contends that "evidence of a fraudulent intent was lacking." However, the State can satisfy the intent element of the offense by showing "intent to injure or defraud or to deceive." N.C. Gen. Stat. § 14-254(a) (2007) (emphasis added). As discussed *supra*, the State presented sufficient evidence for a rational jury to infer the intent to defraud beyond a reasonable doubt.

Even absent the intent to defraud, when the evidence is viewed in the light most favorable to the State, it is clear that defendant intended to deceive. Defendant applied credits to accounts for which no payments had been received. She did not report any accounting discrepancies to her supervisor. She also applied a bank credit against several accounts to conceal the fact that she had made chargebacks. In ruling upon a motion to dismiss, evidence favoring the State is to be considered as a whole in determining its sufficiency. *Earnhardt*, 307 N.C. at 67, 296 S.E.2d at 652-53. As a whole, it is apparent that the evidence is

substantial, not only as to the intent to deceive, but also as to inferring the intent to defraud.

Accordingly, we hold that the State presented substantial evidence of defendant's fraudulent intent. The trial court did not err in denying defendant's motion to dismiss the corporate malfeasance charge.

Next, defendant contends that a discrepancy between the dates of two offenses alleged in the indictment and the dates actually proven in court constitutes a fatal variance. Defendant, however, has failed to preserve this argument for appellate review.

The North Carolina Rules of Appellate Procedure require that

[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.

N.C. R. App. P. 10(b)(1) (2007); *see also State v. Baldwin*, 117 N.C. App. 713, 717, 453 S.E.2d 193, 195, *cert. denied*, 341 N.C. 653, 462 S.E.2d 518 (1995) (holding a defendant's motion to dismiss insufficient to preserve the issue of a fatal variance where the defendant did not assert the variance as specific grounds for his motion to dismiss). In interpreting this rule, the North Carolina Supreme Court has stated, "This Court will not consider arguments based upon matters not presented to or adjudicated by the trial tribunal." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991).

Here, defendant raised only a general motion to dismiss at the close of the evidence, without making any argument or taking further action to bring the purported variances to the trial court's attention. Because defendant failed to preserve the issue of a fatal variance on appeal, we do not address it. *See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 195-96, 657 S.E.2d 361, 364 (2008) ("[A] party's failure to properly preserve an issue for appellate review ordinarily justifies the appellate court's refusal to consider the issue on appeal.").

For the foregoing reasons, we hold that the trial court did not err by denying defendant's motion to dismiss the charge of embezzlement and by denying defendant's motions to dismiss the charges of corporate malfeasance.

No Error.

Judges MCGEE and STEELMAN concur.

Report per Rule 30(e).