NO. COA12-747
NORTH CAROLINA COURT OF APPEALS

Filed: 18 December 2012

STATE OF NORTH CAROLINA

v. Johnston County
No. 11 CRS 50226; 11 CRS 607

HUBERT MARSHALL BROOKS, JR.

Appeal by Defendant from judgment entered 1 December 2011 by Judge Craig Croom in Johnston County Superior Court. Heard in the Court of Appeals 24 October 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General Daniel Addison, for the State.

Megerian & Wells, by Franklin E. Wells, Jr., for Defendant.

BEASLEY, Judge.

Hubert Brooks, Jr. (Defendant) appeals from judgment entered on his conviction for obtaining property by false pretenses. For the following reasons, we find no error.

On 20 November 2010, Defendant purchased stereo equipment for his car and had them installed at a total cost of $579 using a credit card in the name of Maydeen Martin, an 86-year-old woman. Defendant informed the clerk that he had permission to

use the card. The clerk received approval from his boss to run the card because Defendant was a regular customer. Defendant signed his own name on the sales slip. Defendant was later arrested and charged with obtaining property by false pretenses, forgery, uttering, and attaining habitual felon status.

At trial, Defendant claimed that his girlfriend, Ms. Pulley, had authorized his use of the card. Ms. Pulley worked as a nurse's aide in Ms. Martin's home. Defendant testified that, based on assertions made to him by Ms. Pulley, he believed the card belonged to Ms. Pulley's grandmother and that Ms. Pulley was authorized to use the card, and had indeed used the card many times in Defendant's presence. Defendant had never met Ms. Martin.

Ms. Martin's children, Mr. Martin and Ms. Martin-Leutgens, testified for the State. Both children, neither of whom lived at home, were involved in their mother's finances due to her inability to do so on her own, although Ms. Martin-Leutgen took primary responsibility. Upon direct examination of Mr. Martin, the State asked, "Did . . . [your mother] ever let anyone use the credit card?" He responded, "No, ma'am." Defendant then objected, providing no grounds. After a side-bar conference, the objection was overruled.

Ms. Martin-Leutgen testified that she was alerted to the use of the card when she reviewed the statement in December 2010, listing a balance of $6,915, which was significantly higher than the $300 balance on the last statement she reviewed. The charges were all at stores that her parents would not be likely visit. She further testified that a second nurse's aide, Ms. Murray, was authorized to use the card for necessities like gas for the car. On direct examination, the State asked Ms. Martin-Leutgens about the use of the card, "Did anyone else have permission, ever?" She replied, "Absolutely not. To my knowledge[.]" Defendant then objected, but withdrew the objection after a side-bar conference. The State later asked Ms. Martin-Leutgens again about the use of the card:

> Q. [D]o you know if your mother, Maydeen Martin, ever let anyone use that card except in circumstances that you've already identified with Felicia Murray? Did she let anybody outside the family use her card ever?
>
> A. No.
>
> [Defendant's counsel]: Your Honor, I object to that. The witness has testified –
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> THE COURT: Hang on. Y'all come back up here.
>
> (Side-Bar conference.)
>
> THE COURT: Objection's overruled.

> [State]: Nothing further.
>
> THE COURT: Ask that question again. I don't know the response.
>
> . . . .
>
> Q. And aside from the circumstances that you've identified that involved Felicia Murray using that card in emergency situations, aside from that, as far as you know, did your mother ever let anyone other than family members use her credit card at any time?
>
> A. Never.
>
> [Defendant's counsel]: Your honor, I renew that same objection for the same reason.
>
> . . . .
>
> THE COURT: In light of her response, it changed from before; from a no to never, like ever, ever. So based on her response, the objection is sustained.

The State then rephrased the question and proceeded without objection.

Additional evidence presented by the State included the testimony of the clerk who sold the stereo equipment and the arresting officer. The clerk testified that Defendant stated it was his aunt's card and she gave him permission to use it. Defendant also handed the clerk his cell phone and a woman's voice on the line stated Defendant could use the card but

provided no identification. The arresting officer testified that Defendant admitted to using the card but stated that it was his mother's card and she gave him permission to use it.

Defendant made a motion to dismiss at the close of the State's evidence and at the close of Defendant's evidence. Both were denied. The jury found Defendant guilty of obtaining property by false pretenses. From this conviction, he appeals.

Defendant first argues that the trial court erred by allowing a witness to testify that her mother had not authorized the use of her credit card, which amounted to facts outside her personal knowledge. We find this argument waived.

Our Supreme Court has found that "it is well settled that '[a] general objection, if overruled, is ordinarily no good, unless, on the face of the evidence, there is no purpose whatever for which it could have been admissible.'" *State v. Adcock*, 310 N.C. 1, 18, 310 S.E.2d 587, 597 (1984)(quoting 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 27, at 105 (2d rev. ed. 1982)). This Court has previously found that where there is nothing on the face of a "question to indicate that anything other than a response based on . . . personal knowledge was being sought" then the trial court may interpret a general objection as being to the form of the question and may

exercise its discretion in permitting the question. *State v. Brewington*, 80 N.C. App. 42, 51, 341 S.E.2d 82, 88 (1986).

"This Court has said that '[f]ailure to move to strike a portion of an answer, even though the answer is objected to, results in waiver of the objection.'" *State v. Hooper*, 318 N.C. 680, 681, 351 S.E.2d 286, 287 (1987)(quoting *State v. Marlow*, 310 N.C. 507, 523, 313 S.E.2d 532, 542 (1984)). In *State v. Wells*, 52 N.C. App. 311, 278 S.E.2d 527 (1981), we found no waiver occurs and no motion to strike is required where the objection is to a question that plainly calls for inadmissible testimony but is overruled, allowing the witness to answer. *Id.* at 314, 278 S.E.2d at 529. However, the objection in that case preceded the answer. *Id.* The same rule does not apply where the objection comes after the answer: "If the testimony is incompetent, objection thereto should have been interposed to the question at the time it was asked as well as to the answer when given." *State v. McKethan*, 269 N.C. 81, 88, 152 S.E.2d 341, 346 (1967)(citations omitted). "Objection not taken in apt time is waived." *Id.* Also, if the question may be deemed proper on its face and "does not indicate the inadmissibility of the answer, defendant should move to strike as soon as the

inadmissibility becomes known. Failure to do so constitutes a waiver." *Brewington*, 80 N.C. App. at 51, 341 S.E.2d at 88.

Here, Defendant asserts on appeal that he objected to the form of the State's questions as calling for information outside the witness's personal knowledge on three occasions.[1] In one instance, Defendant expressly withdrew his objection, thereby inviting the answer; thus, his argument is waived with respect to that occurrence. *See State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001)("[A] defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review.").

In the remaining two instances, Defendant's objections did not occur until *after* the answer was given. Defendant did not move to strike either answer. Both were general objections as far as the record indicates.[2] Further, we find both instances similar to the facts in *Brewington*, where the prosecutor asked a

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[1] We note that the first occasion raised by Defendant occurred during the testimony of Mr. Martin and the latter two occurred during the testimony of Ms. Martin-Leutgens, even though Defendant only addressed the testimony of Ms. Martin-Leutgens in the issue presented itself. However, we will discuss all three because the same result applies.

[2] In the third instance, Defendant began providing grounds ("The witness has testified" but was interrupted by the trial court to approach the bench for a sidebar conversation. Defendant did not make an effort to note the grounds for the objection on the record following this conversation, but when the trial court requested the State repeat the question, Defendant objected again "for the same reason." It is not apparent to this Court what that reason was and thus, on review, this is a general objection.

witness "Did . . . [the defendant] know that you carried money in that folder?" and this Court found that there was no indication on the face of this question that anything but the personal knowledge of the witness was requested. *Brewington*, 80 N.C. App. at 50-51, 341 S.E.2d at 87-88. Here, the State asked, "Did she ever let anyone use the credit card?" and, "Did she let anybody outside the family use her card ever?" We do not find either question indicative of a request for information outside the realm of the witnesses' personal knowledge. Thus, the trial court was within its discretion to find the form of the question permissible. *See id.* Therefore, Defendant's ground for objection must be based in the answer. It is apparent to this Court that the trial court properly understood this by virtue of the fact that it, at one point, sustained Defendant's objection on the basis of the response where the witness changed her answer from "no" to "never" following the court's request that the question be repeated. Nonetheless, Defendant's failure to move to strike either answer to which he appeals waives any objection he made. *Id.*

Defendant next argues that he was deprived of the right to face his accuser because the cardholder never testified. "[I]n conformity with the well established rule of appellate courts,

we will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the court below." *State v. Jones*, 242 N.C. 563, 564, 89 S.E.2d 129, 130 (1955). At trial, Defendant failed to raise any contention that his Sixth Amendment rights were violated and as such we will not review such claims here. This argument is waived.

Defendant last argues that the trial court erred in denying his motion to dismiss because there was insufficient evidence upon which to base a conviction. Specifically, Defendant argues that the State did not prove that Defendant had the requisite intent to defraud because it did not offer testimony from the cardholder that neither Defendant nor Ms. Pulley was authorized to use the card and did not counter the evidence that Ms. Pulley told Defendant he had permission to use the card. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007)(citation omitted). Denial is proper where the State has presented substantial evidence of each element of the crime. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a

conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). The evidence is considered in the light most favorable to the State. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

It is not necessary for the State to prove intent with direct evidence; circumstantial evidence is sufficient where it allows the trier of fact to infer that the requisite intent was present. *State v. Hines*, 54 N.C. App. 529, 533, 284 S.E.2d 164, 167 (1981) (finding the evidence sufficient for a guilty verdict on a false pretenses charge even where the defendant testified as to an innocent intent) (citations omitted). We find the evidence detailed above sufficient for a reasonable trier of fact to infer that Defendant had the requisite intent to defraud. Defendant's argument of error on this point is overruled.

No Error.

Judges ELMORE and STROUD concur.

Report per Rule 30(e).