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NO. COA13-216  
NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2013

STATE OF NORTH CAROLINA

v.

Duplin County  
Nos. 10 CRS 50519-20  
12 CRS 51263

MCKENZIE KEYELLE MILLER

Appeal by defendant from judgment entered 16 October 2012  
by Judge John E. Nobles, Jr. in Duplin County Superior Court.  
Heard in the Court of Appeals 28 August 2013.

*Attorney General Roy Cooper, by Assistant Attorney General  
Elizabeth A. Fisher, for the State.*

*Michael J. Reece for defendant-appellant.*

HUNTER, Robert C., Judge.

Defendant McKenzie Keyelle Miller ("defendant") appeals  
from judgment sentencing him to 88-110 months imprisonment after  
being convicted on two counts of possession of a stolen motor  
vehicle and two counts of obtaining property by false pretenses.  
On appeal, defendant argues that the trial court erred by giving  
one instruction for two counts of obtaining property by false  
pretenses and not distinguishing between the two, thus denying

defendant a unanimous jury verdict. After careful review, we find no error.

### **Background**

Defendant was indicted in case numbers 10 CRS 50519 and 10 CRS 50520 for charges of larceny of a motor vehicle, possession of a stolen motor vehicle, obtaining property by false pretenses, and misdemeanor larceny. All charges stemmed from one incident where a 1992 Dodge van was stolen and sold to Duplin Auto Salvage and Recycling, LLC ("Duplin Auto Salvage"). Defendant was also charged in both cases with attaining habitual felon status. Before trial, however, the prosecutor dropped the charge for larceny of a motor vehicle.

Defendant was also indicted in case number 12 CRS 51263 for charges of larceny of a motor vehicle, possession of a stolen motor vehicle, and obtaining property by false pretenses. These charges stemmed from a second incident where a 1991 Nissan Sentra was stolen and sold to Duplin Auto Salvage. Defendant was again charged in this case with attaining habitual felon status. The prosecution also dropped this charge for larceny of a motor vehicle before trial.

All three cases against defendant were joined for trial on 15 October 2012. At trial, the prosecution presented evidence relating to the theft of both the 1992 Dodge van and the 1991 Nissan Sentra. Specifically, the prosecution presented evidence

of two checks paid to defendant by Duplin Auto Salvage for the sales of both vehicles. Moreover, defendant stipulated that it was his signature on the back of both checks. The prosecution presented further evidence of an eye witness identification of defendant as the individual who sold both cars, as well as sales records containing defendant's identification information. Finally, the prosecution presented a recorded phone conversation wherein defendant admitted taking a car to the junk yard. Defendant put forth no evidence at trial.

At the close of evidence, the parties reached an agreement on the proposed jury instructions. The trial court first instructed the jury on the law for both counts of possession of a stolen motor vehicle, differentiating between each count by vehicle make and model. Next, the trial court gave one instruction for two counts of obtaining property by false pretenses as follows:

The defendant has been charged with obtaining property by false pretenses. For you to find the defendant guilty of this offense, the State must prove five things beyond a reasonable doubt:

First, that the defendant made a representation to another.

Second, that this representation was false.

Third, that this representation was calculated and intended to deceive.

Fourth, that the victim was, in fact,

deceived by this representation.

And, fifth, that the defendant thereby obtained or attempted to obtain property from the victim.

The trial court further instructed the jury to "remember the evidence" and they must agree "upon a unanimous verdict as to each charge." After the instructions were read, defendant responded in the negative when asked by the trial court if he had anything to add to the previous instructions.

Both attorneys indicated they were satisfied with the verdict sheets before they were sent back to the jury. The trial court then presented the jury with three verdict sheets, one from each case. The first two verdict sheets were for case numbers 10 CRS 50519 and 10 CRS 50520 involving the 1992 Dodge van. Each of these verdict sheets contained only one count each; 10 CRS 50519 contained one count of possession of a stolen motor vehicle and 10 CRS 50520 contained one count of obtaining property by false pretenses. The third verdict sheet was for case number 12 CRS 51263 concerning the 1991 Nissan Sentra. This verdict sheet contained two counts, one for obtaining property by false pretenses and another for possession of a stolen motor vehicle. In total, there were three cases and four counts.

During jury deliberation, the trial court received notice from the jury foreman there was confusion on the number of

counts for possession of a stolen motor vehicle. The trial court, with agreement from both parties, allowed the jury to re-enter the courtroom to address the confusion. The trial court learned the confusion stemmed from a typo in the verdict sheet and informed the jurors the count should read "possession" not "possess" of a stolen motor vehicle. The jurors were further instructed to recall the number of vehicles in the matter to determine the number of counts. The jury then signified their confusion was clarified and returned to deliberate.

Seven minutes later, the jury returned a verdict of guilty on all four counts. One verdict sheet contained a scribbled-out mark next to "not guilty" for one count of obtaining property by false pretenses; the foreman wrote his initials next to the scratched-out mark. [R. p. 83]. All jurors later ratified their previous verdict when polled. [T2. p. 150]. Defendant then entered a negotiated plea for habitual felon status for all three cases and was sentenced to a minimum of 88 and maximum of 110 months in prison for the four counts in which he was convicted. Defendant timely appealed this verdict.

## **Discussion**

### **I. Jury Unanimity**

Defendant argues he was denied a unanimous jury verdict when the trial court gave one instruction for, and failed to distinguish between, two separate counts of obtaining property

by false pretenses. Specifically, defendant contends that without this information the jury could not know the specific count for which it was convicting him. We disagree.

Defendant failed to object at trial that he was denied a unanimous jury verdict; however, “[v]iolations of constitutional rights, such as the right to a unanimous verdict . . . are not waived by the failure to object at trial and may be raised for the first time on appeal.” *State v. Wiggins*, 161 N.C. App. 583, 592, 589 S.E.2d 402, 409 (2003). “The standard of review for alleged violations of constitutional rights is *de novo*.” *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), *appeal dismissed and disc. review denied*, 363 N.C. 857, 694 S.E.2d 766 (2010); *see also Piedmont Triad Reg’l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001) (“[D]e novo review is ordinarily appropriate in cases where constitutional rights are implicated.”) (citations omitted). Therefore, we review defendant’s argument he was denied a unanimous jury verdict *de novo*.

“No person shall be convicted of any crime but by the unanimous verdict of a jury in open court.” N.C. Const. art. I, § 24. “In all criminal cases the defendant has the right to be tried by a jury of 12 whose verdict must be unanimous.” N.C. Gen. Stat. § 15A-1201 (2011). This Court has previously held that when the defendant presents a question of jury unanimity

"we must examine the verdict, the charge[s], the jury instructions, and the evidence to determine whether any ambiguity as to unanimity has been removed." *State v. Brewer*, 171 N.C. App. 686, 692, 615 S.E.2d 360, 364 (2005), *disc. review denied*, 360 N.C. 484, 632 S.E.2d 493 (2006) (citation omitted); *see also State v. Bates*, 179 N.C. App. 628, 633, 634 S.E.2d 919, 922-23 (2006). Thus, to determine whether defendant was denied a unanimous jury verdict, we examine the following four factors: (1) the charges; (2) the evidence; (3) the jury instructions; and (4) the verdict.

**A. Factors (1) and (2): Charges and Evidence**

This Court has previously held "[t]here is no risk of a lack of unanimity where the defendant was charged with and convicted of the same number of offenses, and the evidence supported that number of offenses." *Brewer*, 171 N.C. App. at 693, 615 S.E.2d at 364. Here, defendant was charged with two counts of obtaining property by false pretenses and was convicted of two counts. During defendant's trial, only two incidents for obtaining property by false pretenses were presented into evidence. One incident involved a 1992 Dodge van and the other incident involved a 1991 Nissan Sentra. Thus, the number of charges equals the number of convictions and the evidence put forth during trial supports that number of offenses.

**B. Factor (3): Jury Instructions**

When reviewing a trial court's charge to the jury, the instructions must be considered in their entirety. *State v. Davis*, 321 N.C. 52, 59, 361 S.E.2d 724, 728 (1987). "This Court has held that the trial court may protect the defendant's right to a unanimous verdict by instructing the jury that they must be unanimous as to the particular criminal offense that the defendant committed." *Brewer*, 171 N.C. App. at 693, 615 S.E.2d at 364 (citation and quotation omitted).

Here, the trial court gave one instruction for, and failed to distinguish between, both counts of obtaining property by false pretenses. The trial court, however, previously distinguished between the two incidents by the make and model of the vehicle in its instructions on both counts of possession of a stolen motor vehicle. The trial court further instructed the jury that its decision must be unanimous as to each count charged. Thus, the trial court's instructions, taken in their entirety, make it clear that the jury should have considered charges surrounding both the 1992 Dodge van and the 1991 Nissan Sentra and rendered a unanimous verdict as to each count charged.

Furthermore, in the case of *State v. Massey*, 174 N.C. App. 216, 222, 621 S.E.2d 633, 637 (2005), *rev'd in part on other grounds*, 361 N.C. 406, 646 S.E.2d 362 (2007), the defendant



argued the trial court erred when it did not separately instruct the jury as to each count. This Court held that the trial court "does not have to instruct on each count separately." *Id.* at 222, 621 S.E.2d at 638. Therefore, the failure of the trial court in this case to instruct on each count of obtaining property by false pretenses separately does not constitute error.

**C. Factor (4): Verdict Sheets**

This Court has ruled "that where the verdict sheets . . . identified the . . . offenses only by the felony charged . . . and their respective case numbers . . . the verdict sheets did not lack the required degree of specificity needed for a unanimous verdict if they could be properly understood by the jury based on the evidence presented at trial." *Bates*, 179 N.C. App. at 634, 634 S.E.2d at 922 (internal quotation marks omitted). Here, there were three verdict sheets. The first two verdict sheets contained one count each and the third verdict sheet contained two counts. All three verdict sheets were distinguished by the case number listed at the top and the corresponding counts of each charge below. The jury was only presented with two incidents during the presentation of evidence in which obtaining property by false pretenses could have occurred; one incident involved the 1992 Dodge van and the other involved the 1991 Nissan Sentra. Accordingly, there can be no

assignment of error with the verdict sheets in this case because they effectively allowed the jury to match each verdict of guilty with the specific crime charged.

In addition to the four factors listed above, we also note the following: (1) when polled, all jurors ratified their verdict of guilty on all four counts; (2) the jury's confusion during deliberation did not concern the two counts for obtaining property by false pretenses and was quickly cleared up by the court; (3) after the confusion was cleared up, the jury needed only seven minutes to return its verdict; and (4) the jury foreman corrected his mistake by placing his initials next to the scribbled-out mark beside the option of not guilty of obtaining property by false pretenses.

Based on the foregoing analysis, we find that defendant was not denied a unanimous jury verdict and the trial court committed no error in its instruction.

## **II. Defendant's Motion to Dismiss**

Defendant listed as a proposed issue on appeal whether the trial court erred in denying his motion to dismiss at the close of the State's evidence. However, defendant does not address this issue in his brief on appeal. "All other issues or questions not argued by Defendant in his brief are deemed abandoned." *State v. Brooks*, 204 N.C. App. 193, 195, 693 S.E.2d 204, 207 (2010). Since defendant did not present an issue in

his brief concerning the motion to dismiss, it is abandoned on appeal.

**Conclusion**

In consideration of the foregoing analysis under the framework developed by this Court in *Brewer* and *Bates* combined with other factors of note, we find defendant was not denied a unanimous jury verdict. We also find that any argument related to defendant's motion to dismiss has been abandoned. Accordingly, we find no error.

NO ERROR.

Judges GEER and McCULLOUGH concur.

Report per Rule 30(e).