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NO. COA13-235
NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2013

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 09 CRS 215715

VONYEDA LEDAWN CARSON

Appeal by defendant from judgment entered 31 July 2012 by Judge James W. Morgan in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 September 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Mary L. Lucasse, for the State.

Guy J. Loranger for defendant-appellant.

McCULLOUGH, Judge.

On 31 July 2012, a jury found defendant Vonyeda Ledawn Carson guilty of attempting to obtain property by false pretense and uttering a forged instrument. The trial court consolidated the offenses and entered judgment by sentencing defendant to a term of eight (8) to ten (10) months imprisonment. The trial court suspended the sentence and placed defendant on supervised probation for a period of thirty (30) months, including six (6)

months of supervision in the Intensive Supervision Program and seventy-five (75) days in the custody of the Mecklenburg County Jail as a special condition of her probation. On appeal, defendant contends the trial court erred (1) by improperly admitting evidence in violation of Rule 401 and Rule 403 of the North Carolina Rules of Evidence and (2) by instructing the jury on flight. After thorough review, we hold no error.

I. Background

On 23 January 2009, defendant attempted to cash a check at a Wells Fargo Bank in Charlotte, North Carolina. Jonathan Eric Johnson ("Johnson"), a teller, testified that defendant presented him with a check that "seemed very suspicious" and had "a lot of red flags for a possible bad check." The check, made payable to defendant in the amount of $2,665.45, was drawn on the account of Ruehlen Supply Company. Johnson testified that based on his training and experience, the following details of defendant's check indicated it was fraudulent: the memo line was filled out to "United States of America"; there were "asterisks all over the check"; the date and the numerical amount of money were not on the same line as the typed-out amount of the check; the date was printed as "01/15/100"; and, there were different fonts used throughout the check. Thereafter, Johnson asked defendant for identification and

defendant gave him a social security card, an identification card, and an expired college identification card.

Believing the check to be fraudulent, Johnson told defendant that that he would “be back in just a moment” and attempted to follow bank procedure by calling the Wells Fargo’s loss management department. When Johnson went into the back of the bank to make the phone call, a fellow teller, Aferdita Osmani (“Osmani”), was already on the phone with the loss management department reporting an altered check tendered by another customer. Johnson then called his branch manager, William Marshall (“Marshall”), to inform him of the situation.

Johnson testified that Osmani’s customer was a female standing in line next to defendant. Marshall requested that both defendant and Osmani’s customer take a seat in the waiting area to which they both complied. While the women were waiting in the lobby, Johnson’s next customer was a male who presented a $7,000.00 check also appearing to be altered. Johnson informed Marshall of the situation with this male customer. The police were notified.

Before police arrived, defendant, Osmani’s female customer, and the male customer left the bank. Defendant left without reclaiming her identification, her social security card, or her check.

Defendant testified in her own defense. Defendant received the check at issue from an individual named Melvin Lucky ("Lucky"). The check represented two months of work cleaning apartments for Lucky. Defendant had not noticed that the check was drawn from Ruehlen Supply Company and did not notice anything peculiar about the check.

Defendant testified that on 23 January 2009, she rode with Lucky to Wells Fargo Bank. Defendant knew Osmani's female customer through cleaning assignments and identified her as "Kim." Defendant saw Kim and spoke with her once inside the bank but did not know how Kim arrived at the bank.

After defendant tendered her check to a teller and also provided an identification card, social security card, and thumbprint, she had a seat in the waiting area. Kim was already sitting in the waiting area. Defendant testified that she asked one of the associates at the bank for her identification but the associate informed her that she had to wait. Thereafter, defendant and Kim walked out into the parking lot to talk to Lucky. Once outside, defendant got into an argument and left the bank.

On 29 November 2010, defendant was indicted for one count of obtaining property by false pretenses in violation of N.C. Gen. Stat. § 14-100 and one count of uttering a forged paper in

violation of N.C. Gen. Stat. § 14-120. On 31 July 2012, a jury found defendant guilty of one count of attempting to obtain property by false pretense and one count of uttering a forged instrument.

The trial court found defendant's prior record level to be Level II. The trial court consolidated defendant's convictions and sentenced her to eight (8) to ten (10) months imprisonment. Defendant's sentence was suspended and the trial court ordered defendant to be placed on supervised probation for thirty (30) months, including a requirement that defendant serve a term of seventy-five (75) days in the Mecklenburg County Jail and six (6) months of her probation in the Intensive Probation Program. Defendant appeals.

II. Rule 403 Evidence

Defendant first argues that the trial court erred by admitting evidence that two other individuals presented altered checks at the bank at the same time as defendant's alleged offenses. Defendant contends that this evidence was irrelevant, in violation of Rule 401 of the North Carolina Rules of Evidence, and that it "created the danger of unfair prejudice, confusion of the issues and mislead[] the jury," in violation of Rule 403 of the North Carolina Rules of Evidence. In the instance that this Court does not find defendant properly

preserved this issue for appellate review, defendant urges us to review her argument for plain error.

Under Rule 401 of the North Carolina Rules of Evidence, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2011). Generally, all relevant evidence is admissible. N.C. Gen. Stat. § 8C-1, Rule 402 (2011). However, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." N.C. Gen. Stat. § 8C-1, Rule 403 (2011). "The admission of evidence which is technically inadmissible will be treated as harmless unless prejudice is shown such that a different result likely would have ensued had the evidence been excluded." *State v. Gappins*, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987) (citations omitted).

On 30 July 2012, defendant filed a motion in limine to prohibit the State from introducing the following evidence:

> That [defendant] was associated with or accompanied by or interacted with any other customer at Wachovia Bank (currently Wells Fargo Bank) on the day of the alleged offense.

> The actions of any other customer at Wachovia Bank that were presented before or after on the day of the alleged offense.

Following voir dire, the trial court denied the motion in part and granted the motion in part. The trial court ruled that any evidence that defendant worked in concert with other individuals at the bank was inadmissible. However, the trial court also ruled that evidence concerning "three bad checks in a row" and that "at least two of [the individuals] left at approximately the same time" would be admissible.

A review of the record reveals that after the court's ruling on defendant's motion in limine, defendant did not object to the State's presentation of evidence regarding the two other individuals who had presented altered checks while defendant was present.

It is well established that

> [a] motion in limine is insufficient to preserve for appeal the question of the admissibility of evidence if the defendant fails to further object to that evidence at the time it is offered at trial. Rulings on motions in limine are preliminary in nature and subject to change at trial, depending on the evidence offered, and thus an objection to an order granting or denying the motion is insufficient to preserve for appeal the question of the admissibility of the evidence.

State v. Reaves, 196 N.C. App. 683, 686, 676 S.E.2d 74, 77 (2009) (citation omitted). Where defendant failed to object to this evidence at the time it was offered at trial, we hold that she has not properly preserved her challenge to the admission of this evidence.

In the alternative, defendant contends that the admission of evidence concerning the two other individuals at the bank amounted to plain error and requests that we review for plain error.

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. Rule 10(a)(4) (2013). Plain error arises only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citing *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)).

Defendant relies on two cases for her argument: *State v. Cowan*, 194 N.C. App. 330, 669 S.E.2d 811 (2008) and *State v.*

Moctezuma, 141 N.C. App. 90, 539 S.E.2d 52 (2000). In *Cowan*, pursuant to a search warrant of the defendant's residence, police found marijuana, cocaine, methamphetamine, firearms, thousands of dollars, and drug paraphernalia. *Cowan*, 194 N.C. App. at 331, 669 S.E.2d at 814. The defendant was convicted by a jury of eight different offenses related to the controlled substances and firearms found. *Id.* at 331, 669 S.E.2d at 813. At trial, the defendant objected to the admission of evidence regarding the drug trafficking trial and conviction of the defendant's aunt. The defendant argued that this evidence was irrelevant and highly prejudicial. *Id.* at 332, 669 S.E.2d at 814. Our Court concluded that there was no evidence that the defendant's aunt's criminal activities had any relation to the crimes for which the defendant was charged, and therefore, was irrelevant. *Id.* at 332-33, 669 S.E.2d at 814-15. However, our Court held that because there was sufficient evidence to convict defendant based upon the controlled substances and firearms found in the residence, the admitted irrelevant evidence was not prejudicial and that there was no reasonable possibility that a jury would have reached a different verdict in the absence of this evidence. *Id.* at 333, 669 S.E.2d at 815.

In *Moctezuma*, police officers conducted surveillance on a drug deal pursuant to a tip from a confidential informant.

Moctezuma, 141 N.C. App. at 91, 539 S.E.2d at 54. A white van was driving down Statesville Road in Charlotte, North Carolina and drove to a trailer on Perkins Road where the defendant and several other people resided. *Id.* Three men, including the defendant, emerged from the van and entered the trailer. The three men came out of the trailer shortly thereafter and then drove to and parked at a Food Lion grocery store. Another man approached the van, opened the van's sliding door, talked to someone inside, and then walked away. *Id.* Officers surrounded the van to apprehend the suspects. The defendant was found in the driver's seat and 136.69 grams of cocaine were found on the right side of the driver's seat. *Id.* At trial, the defendant testified that he lived in the trailer with several men, including Sergio Burroto ("Burroto"). The defendant testified that Burroto instructed him to drive the van to the Food Lion but that he had no knowledge of the presence of cocaine in the van. *Id.* at 92, 539 S.E.2d at 54. For the limited purpose of showing the defendant's awareness of cocaine in the van, the trial court allowed the State to present evidence regarding drugs and drug paraphernalia found in Burroto's bathroom and in the front room of the trailer. Thereafter, the defendant was convicted of trafficking in cocaine by transporting. *Id.*

The *Moctezuma* defendant argued that because he was not charged in connection with the drugs found in the trailer, admission of this evidence was both irrelevant and prejudicial. The State argued that pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b)[1], "the evidence seized at the trailer is evidence of other wrongs that tends to show defendant's knowledge of the cocaine in the van." *Id.* at 94, 539 S.E.2d at 56. Our Court noted that there were no crimes, wrongs or acts with which defendant was connected; there was no evidence to directly link the defendant to the drugs seized at the trailer; and, the circumstantial evidence that the drugs belonging to others were discovered at the trailer the defendant shared with several other people was too weak to support an inference of knowledge on the defendant's part. *Id.* at 95, 539 S.E.2d at 56. Our Court held that "[b]ecause there was insufficient evidence to connect defendant with the drugs seized at the trailer, evidence of such was improperly admitted to show defendant's knowledge of cocaine in the van." *Id.* Our Court further held that because the admission of this evidence was irrelevant and prejudicial,

[1] N.C.G.S. § 8C-1, Rule 404(b) (2011) states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident."

because it could have easily led the jury to believe the defendant was a high level drug trafficker, the defendant was entitled to a new trial. *Id.*

We hold that the cases cited by defendant are distinguishable from the case before us. In *Cowan*, the defendant objected to the challenged testimony when it was offered at trial. Here, defendant made no timely objection to the introduction of the challenged evidence at trial. It is well established that the plain error test places a much heavier burden upon defendant because "the defendant could have prevented any error by making a timely objection." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986) (citation omitted). In *Moctezuma*, there was no evidence to directly link the defendant to the drugs seized at the trailer and the Court found that the jury could have easily concluded the defendant was a high level drug trafficker based on the drugs found, amounting to prejudice. In contrast, assuming *arguendo* that it was error for the trial court to admit this evidence in the case *sub judice*, defendant has failed to establish that she was prejudiced by its admission.

A review of the record indicates that given the other evidence of defendant's guilt presented at trial, defendant cannot show a reasonable possibility that a different verdict

would have been reached. Therefore, defendant's argument is overruled.

III. Jury Instruction

Next, defendant argues that the trial court erred by instructing the jury regarding flight against her objection where there was insufficient evidence presented to support the instruction. We disagree.

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court. [A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *State v. Davis*, __ N.C. App. __, __, 738 S.E.2d 417, 419 (2013) (citations and quotation marks omitted).

"An instruction on flight is appropriate where there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime[.] The relevant inquiry concerns whether there is evidence that defendant left the scene of the [crime] and took steps to avoid apprehension." *State v. Ethridge*, 168 N.C. App. 359, 362, 607 S.E.2d 325, 327-28 (2005) (citations and quotation marks omitted). "This Court has held that an action not part of [d]efendant's normal pattern of behavior . . . could be viewed

as a step to avoid apprehension." *Davis*, __ N.C. App. at __, 738 S.E.2d at 419 (citation and quotation marks omitted).

In the present case, there is ample evidence to suggest defendant left the scene of the crime in order to avoid apprehension. The State offered evidence and defendant admitted that she left the bank after having been asked to wait in the lobby and before having her check cashed. Defendant also left the bank without retrieving her check allegedly worth $2,665.45, her identification, or her social security card.

Moreover, the jury instruction regarding flight read, "Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient in itself to establish a defendant's guilt." Therefore, the trial court emphasized that even if the jury found the circumstance of flight to be present, it alone was not sufficient to find defendant guilty. Based on the foregoing, we hold that the trial court did not err by giving an instruction on flight to the jury.

No error.

Judges McGEE and DILLON concur.

Report per Rule 30(e).