IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-393

Filed: 21 August 2018

Mecklenburg County, Nos. 14 CRS 200723; 15 CRS 19239

STATE OF NORTH CAROLINA,

v.

ANDREA DENEEN CROWDER, Defendant.

Appeal by defendant from judgment entered 12 August 2016 by Judge Michael D. Duncan in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 November 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Torrey Dixon, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for defendant-appellant.

BERGER, Judge.

On August 12, 2016, a Mecklenburg County jury convicted Andrea Deneen Crowder ("Defendant") of embezzlement, larceny by an employee, and corporate malfeasance. Defendant argues that (1) the trial court erred in instructing the jury on an acting-in-concert theory; (2) the convictions for embezzlement and larceny by

an employee constitute multiple punishments for the same offense, thus violating the prohibition against double jeopardy; and (3) Defendant's trial counsel gave ineffective assistance by failing to object to her convictions on double jeopardy grounds.

We disagree with Defendant's first and third arguments on appeal. Defendant failed to properly preserve the second argument on appeal, and therefore waived her right to review. We decline to address the merits of this second argument.

Factual and Procedural Background

While on work release from prison, Defendant was hired to work at the uptown Charlotte location of Amelie's French Bakery (the "Bakery"), and eventually became a cashier. Along with the other cashiers at the uptown location, Defendant handled both cash and credit card transactions. Company policy required money to be placed directly in the register following a cash transaction. In addition to handling cash transactions, cashiers were authorized to remove money from the register without permission for use as "petty cash" to run necessary errands for the business.

Video evidence introduced by the State at trial documented dozens of transactions where Defendant, as well as other cashiers, would void cash sales using a "no sale" option at the register but still accept money, which created a cash surplus. The video showed Defendant placing money on top of the register, hiding money under credit card receipts, and later putting money into her pockets. When confronted, Defendant confessed to her employer that she was involved in an

elaborate scheme with other employees to steal money from the Bakery on multiple occasions over an extended period of time. Money was systematically removed from the register throughout the day by other employees. Defendant denied removing money from the register herself, but admitted to accepting money after it had been divided with another cashier.

Defendant was one of two cashiers at the uptown Charlotte location authorized to close out the register at the end of each day. This process involved counting the money in the register and entering the amounts into a "cash reconciliation" spreadsheet. This spreadsheet also included sales information generated by the register, served as a daily report of the Bakery's sales activity, and was submitted to management daily with the cash for deposit.

The spreadsheet would automatically calculate how much money should be withdrawn and taken for deposit, how much should remain in the register, and the difference, if any, between the amount in the register and the amount that should be in the register based on sales and tip activity. Any difference of more than ten dollars would raise suspicions with management, and all modifications made to the spreadsheet were recorded. This modification history indicated that Defendant had changed entries on numerous occasions to lower the difference of the cash present and the cash calculated to less than ten dollars. On several occasions, the difference

reflected a cash surplus of more than $100.00 prior to modifications made by Defendant.

Defendant was indicted for embezzlement, conspiracy to commit embezzlement, and having attained habitual felon status. The State obtained a superseding indictment charging Defendant further with obtaining property by false pretenses, larceny by an employee, and corporate malfeasance. The State dismissed the conspiracy to commit embezzlement and obtaining property by false pretenses charges prior to trial.

At the conclusion of the evidence, the trial court instructed the jury on acting in concert on the charges of embezzlement, larceny by an employee, and corporate malfeasance. Defendant objected to this instruction. Defendant was convicted of embezzlement, larceny by an employee, and corporate malfeasance, and pleaded guilty to having attained habitual felon status. Defendant was sentenced to a term of 111 to 446 months in prison. Defendant timely appealed.

Analysis

I. Acting in Concert

Defendant first argues the trial court erred in instructing the jury on a theory of acting in concert with regard to Defendant's charges of embezzlement, larceny by an employee, and corporate malfeasance. We disagree, because an acting-in-concert

instruction was supported by the evidence introduced by the State for each of these crimes.

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "[I]t is error for the trial judge to charge on matters which materially affect the issues when they are not supported by the evidence. However, if the instruction is based upon a state of facts presented by a reasonable view of the evidence produced at the trial, there is no prejudicial error." *State v. Jennings*, 276 N.C. 157, 161, 171 S.E.2d 447, 449 (1970) (citations omitted).

In explaining the acting-in-concert theory of criminal liability, our Supreme Court stated that:

> [i]t is not . . . necessary for a defendant to do *any particular act* constituting at least part of a crime in order to be convicted of that crime under the concerted action principal so long as (1) he is present at the scene of the crime *and* (2) the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.

State v. Williams, 299 N.C. 652, 656-57, 263 S.E.2d 774, 778 (1980) (citation omitted). "The presence required for acting in concert can be either actual or constructive." *State v. Wallace*, 104 N.C. App. 498, 504, 410 S.E.2d 226, 230 (1991) (citation omitted), *disc. review denied*, 331 N.C. 290, 416 S.E.2d 398, *and cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992). "While actual distance from the crime scene is not always controlling in determining constructive presence, the accused must be near

enough to render assistance if need be and to encourage the actual perpetration of the crime." *State v. Buie*, 26 N.C. App. 151, 153, 215 S.E.2d 401, 403 (1975) (citations omitted).

First, the trial court instructed the jury on acting in concert with regard to embezzlement. Embezzlement consists of three elements:

> (1) . . . the defendant . . . acted as an agent or fiduciary for his principal, (2) that he received money . . . 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. Pate, 40 N.C. App. 580, 583, 253 S.E.2d 266, 269 (citations omitted), *cert. denied*, 297 N.C. 616, 257 S.E.2d 222 (1979).

The trial court next instructed the jury on acting in concert with regard to larceny by employee.

> The elements of larceny by employee are: (1) the defendant was an employee of the owner of the stolen goods; (2) the goods were entrusted to the defendant for the use of the employer; (3) the goods were taken without the permission of the employer; and (4) the defendant had the intent to steal the goods or to defraud his employer.

State v. Fink, ___ N.C. App. ___, ___, 798 S.E.2d 537, 540-41 (2017) (citation and quotation marks omitted). As with a charge of embezzlement, "[l]arceny by an employee requires *lawful* possession." *State v. Brown*, 56 N.C. App. 228, 231, 287 S.E.2d 421, 424 (1982).

"The person accused must have been entrusted with *and received into his possession lawfully* the personal property of another, and thereafter with felonious intent must have fraudulently converted the property to his own use." *State v. Weaver*, 359 N.C. 246, 255, 607 S.E.2d 599, 604 (2005) (citations omitted). To show that the agent converted his principal's property to the agent's own use, "[i]t is sufficient to show that the agent fraudulently or knowingly and willfully misapplied it, or that he secreted it with intent to embezzle or fraudulently or knowingly and willfully misapply it." *State v. Smithey*, 15 N.C. App. 427, 429-30, 190 S.E.2d 369, 370-71 (1972) (citation omitted).

> There is a difference between having access to property and possessing property in a fiduciary capacity. Embezzlement is the fraudulent conversion of property by one who has lawfully acquired possession of it for the use and benefit of the owner, i.e., in a fiduciary capacity. . . . The fact that a defendant is an employee of a business does not change theft of goods from larceny to embezzlement if the defendant never had lawful possession of the property.

State v. Keyes, 64 N.C. App. 529, 532, 307 S.E.2d 820, 822-23 (1983) (citations omitted).

"Possession may be either actual or constructive." *State v. Dow*, 70 N.C. App. 82, 85, 318 S.E.2d 883, 885 (1984) (citing *State v. Crouch*, 15 N.C. App. 172, 174, 189 S.E.2d 763, 764, *cert. denied*, 281 N.C. 760, 191 S.E.2d 357 (1972)). "Constructive possession of goods exists without actual personal dominion over them, but with an intent and capability to maintain control and dominion over them." *State v. Jackson*,

57 N.C. App. 71, 76, 291 S.E.2d 190, 194 (citations and quotation marks omitted), *disc. review denied*, 306 N.C. 389, 294 S.E.2d 216 (1982).

Finally, the trial court instructed on acting in concert with regard to corporate malfeasance. Corporate malfeasance arises when "any . . . cashier . . . of any corporation . . . make[s] any false entry in any book, report or statement of the corporation with the intent in either case to injure or defraud or to deceive any person." N.C. Gen. Stat. § 14-254(a) (2017).

Here, Defendant first argues that the trial court erred by giving the acting-in-concert instruction for embezzlement and larceny by an employee. Specifically, Defendant asserts that she could not have acted in concert because she was only one of two employees authorized to close the register and remove money, and, therefore, only two employees could have had lawful possession of the Bakery's money. Because there was no evidence that this other unnamed cashier had lawfully possessed the money in the register, Defendant contends that the evidence did not support an acting-in-concert instruction for the crimes of embezzlement and larceny by an employee. We disagree.

Defendant was not the only employee in lawful possession of the Bakery's money. The State's evidence tended to show that other cashiers were also acting in a fiduciary capacity and lawfully possessed the money when it was stolen. Defendant and other cashiers handled money routinely when customers made purchases.

Cashiers were authorized to remove "petty cash" for necessary errands without requesting permission. Cashiers acquired and handled money as a function of their job duties, and they were not required to seek permission from management to do so. The money received from purchases was necessarily acquired for the use and benefit of their employer, and it would be eventually removed for deposit with the employer. Until the register was closed at the end of the day and the money was removed for deposit, cashiers had the intent and capability to exercise dominion and control over that money by virtue of their job responsibilities, and were therefore in lawful, constructive possession of it.

Furthermore, a reasonable view of the evidence tended to establish the following: Defendant voided sales to create a cash surplus and divided this surplus with other cashiers, and other cashiers had followed the same scheme or plan. The State introduced substantial evidence to support the conclusion that Defendant was present and able to encourage or assist other cashiers in taking their employer's money. Further, it established that Defendant was acting together with other cashiers in pursuit of a common plan to take and convert this money to their own use. Defendant admitted this to her employer when confronted. This substantial evidence fully supported the instruction of the jury on acting in concert in relation to embezzlement and larceny by an employee.

Defendant also insists that the trial court erred by instructing the jury on acting in concert for corporate malfeasance because there was no evidence that anyone other than Defendant made false entries into the spreadsheet. Again, we disagree.

The State's evidence established that the spreadsheet served as an official daily report of the Bakery's sales activity. The spreadsheet included sales information generated by the register and other information entered by the cashier responsible for closing the register. Voiding a transaction with the "no sale" function would delete any record of a sale and would thereby modify the information generated by the register in the spreadsheet at the conclusion of the day. This resulted in a false entry of sales data into the spreadsheet.

The evidence also tended to show not only that Defendant admitted to voiding sales to create a cash surplus and acknowledged that many other cashiers were involved, but the video evidence also showed multiple instances of voided transactions by Defendant and another cashier when both were in the immediate vicinity of the register. Additionally, video evidence showed dozens of instances of other cashiers voiding transactions while Defendant was present at work.

Defendant was present, and encouraged or assisted other cashiers, in voiding sales. There was substantial evidence that Defendant was acting together with another cashier in pursuit of a common plan to make false entries about sales activity

into the spreadsheet. Therefore, the evidence supported an instruction on acting in concert to commit corporate malfeasance.

The evidence supported a jury instruction on the acting-in-concert theory of criminal liability for embezzlement, larceny by employee, and corporate malfeasance. Because "the instruction [was] based upon a state of facts presented by a reasonable view of the evidence produced at the trial, there is no prejudicial error." *Jennings*, 276 N.C. at 161, 171 S.E.2d at 449.

II. Double Jeopardy

Defendant next argues, for the first time on appeal, that her conviction for embezzlement and larceny by an employee violates the protections against double jeopardy of both the United States and North Carolina Constitutions. Defendant asserts that this is because they constitute multiple punishments for a single offense. However, no objection was made at trial, and Defendant therefore waived review of this claim.

> A defendant's failure to object below on constitutional double jeopardy grounds typically waives his or her right to appellate review of the issue. Further, our Rules of Appellate Procedure require a defendant to make a timely request, objection, or motion below, stating the specific grounds for the desired ruling in order to preserve an issue for appellate review.

State v. Harding, ___ N.C. App. ___, ___, 813 S.E.2d 254, 261 (*purgandum*[1]), *temp. stay allowed*, ___ N.C. ___, 811 S.E.2d 601 (2018).

Defendant freely admits she failed to preserve this issue for appellate review. Instead, Defendant urges this Court to invoke its authority to review this argument under Rule 2 of the North Carolina Rules of Appellate Procedure. She argues her claim is "meritorious[ ] and its review will aid in the development of the law in our state." *See* N.C. R. App. P. 2 (granting this Court discretionary authority under exceptional circumstances to suspend any of the Rules of Appellate Procedure). "[W]hether an appellant has demonstrated that [her] matter is the rare case meriting suspension of our appellate rules is always a discretionary determination to be made on a case-by-case basis." *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 603 (2017), *disc. review allowed on additional issues*, ___ N.C. ___, 813 S.E.2d 849 (2018).

After careful consideration of Defendant's argument and the record on appeal, there are no extraordinary circumstances here that would merit the suspension of our appellate rules. Therefore, we decline to invoke our authority under Rule 2, and decline to review this assertion of error.

III. Ineffective Assistance of Counsel

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[1] Our shortening of the Latin phrase "*Lex purgandum est*." This phrase, which roughly translates "that which is superfluous must be removed from the law," was used by Dr. Martin Luther during the Heidelberg Disputation on April 26, 1518 in which Dr. Luther elaborated on his theology of sovereign grace. Here, we use *purgandum* to simply mean that there has been the removal of superfluous items, such as quotation marks, ellipses, brackets, citations, and the like, for ease of reading.

In an effort to have this Court consider the double jeopardy claim that had not been preserved, Defendant argues that her trial counsel's failure to object to her convictions on double jeopardy grounds amounted to ineffective assistance of counsel. We disagree.

"On appeal, this Court reviews whether a defendant was denied effective assistance of counsel de novo." *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014). "Under the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Sections 19 and 23 of the North Carolina Constitution, '[a] defendant's right to counsel includes the right to the effective assistance of counsel.' " *State v. Perry*, ___ N.C. App ___, ___, 802 S.E.2d 566, 571 (citation omitted), *disc. review denied*, 370 N.C. 377, 807 S.E.2d 568 (2017).

Our courts apply the test laid out in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984), as the uniform measure of ineffective assistance of counsel under the North Carolina Constitution. *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985). On appeal, a defendant must show that his counsel's conduct "fell below an objective standard of reasonableness" to prevail. *Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 693. To show that, the defendant must satisfy a two-part test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This

> requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687, 80 L. Ed. 2d at 693.

To warrant reversal, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 80 L. Ed. 2d at 698. "That requires a substantial, not just conceivable, likelihood of a different result." *Cullen v. Pinholster*, 563 U.S. 170, 189, 179 L. Ed. 2d 557, 575 (2011) (citation and quotation marks omitted).

> [A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.

Braswell, 312 N.C. at 563, 324 S.E.2d at 248.

Multiple criminal takings separated by time and intervening events generally constitute separate criminal offenses for the purposes of double jeopardy analysis. *See State v. Robinson*, 342 N.C. 74, 83-84, 463 S.E.2d 218, 224 (1995), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 793 (1996). For example, in *State v. Robinson*, the defendant was convicted of several charges, including armed robbery and larceny of

an automobile. *Id.* at 78, 463 S.E.2d at 221. There, the defendant robbed the victim and then went to a park to divide the money with an accomplice and dispose of the wallet. *Id.* at 83-84, 463 S.E.2d at 224. While at the park, they spent time observing others at the park and walking around the neighborhood. *Id.* at 84, 463 S.E.2d at 224. Relying on the fact that the defendant returned to the crime scene and stole the victim's vehicle *after* the passage of time and these intervening events, our Supreme Court held that the two takings constituted separate offenses and, therefore, the defendant was not subject to multiple punishments for one offense. *Id.*

Here, there is overwhelming evidence that Defendant committed many separate takings, separated by time and intervening events, like the takings in *Robinson*. Each taking would therefore constitute a separate offense for the purposes of double jeopardy. Defendant confessed to stealing money from her employer on multiple occasions over an extended period of time. Defendant confessed that she had others deposit the money in her account at the work release center. Video evidence showed numerous instances of Defendant voiding sales to create a cash surplus and concealing this cash outside of the register. Revision histories from the spreadsheet showed many modifications by Defendant, on multiple days, to reduce the difference between the amount of cash actually in the register and the cash that should have been in the register.

While there was overwhelming evidence that Defendant committed far more than two separate offenses for which she could be tried, Defendant was only charged and convicted of one count of embezzlement and one count of larceny by an employee. Because criminal takings like these, separated by time and intervening events, create separate offenses unprotected by constitutional double jeopardy claims, it is unlikely the result would have been different had Defendant's counsel objected at trial. Defendant has failed to show a substantial likelihood that there would have been a different result had her trial counsel objected. Therefore, Defendant has failed to prove prejudice, and we find no ineffective assistance of counsel.

Conclusion

Because the State introduced substantial evidence that warranted a jury instruction on the acting-in-concert theory of criminal liability for embezzlement, larceny by employee, and corporate malfeasance, it was not error for the trial court to have given this instruction. Because no objection was made at trial preserving the alleged constitutional violation of double jeopardy, Defendant waived review of this claim, and on this issue we decline to invoke Rule 2 to grant review. Finally, Defendant's trial counsel's failure to object to her convictions on double jeopardy grounds did not constitute ineffective assistance of counsel because Defendant has failed to prove prejudice from this alleged error. Therefore, Defendant received a fair trial, free from error.

NO ERROR.

Judges DAVIS and ZACHARY concur.

Report per Rule 30(e).