IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-901

Filed: 7 July 2020

Mecklenburg County, No. 16 CRS 206216

STATE OF NORTH CAROLINA

v.

RACHELE RENFREW, Defendant.

Appeal by defendant from judgment entered 29 April 2019 by Judge Karen Eady-Williams in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 June 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Phillip K. Woods, for the State.

Arnold & Smith, PLLC, by Paul A. Tharp and Jillian D. Swords, for defendant-appellant.

YOUNG, Judge.

Where the evidence tended to show that defendant received and misused a company credit card, the trial court did not err in denying defendant's motion to dismiss the charges of embezzlement and corporate malfeasance for insufficiency of the evidence. Where the evidence tended to show that defendant had a duty to

account for her expenses in North Carolina, the trial court did not err in denying defendant's motion to dismiss the charges for a lack of jurisdiction. Where defendant challenged the legal theory of jurisdiction, and not the factual basis therefore, the trial court did not err in denying defendant's request for a special instruction on jurisdiction. Where defendant cannot show prejudice resulting from the trial court's evidentiary rulings, either individually or cumulatively, the trial court did not commit prejudicial error. Where the only variance in the indictment was the amount of money allegedly misapplied by defendant, that variance was not a fatal one, and the trial court did not err in denying defendant's motion to dismiss.

I. Factual and Procedural Background

From 2013 to 2015, Rachele Renfrew (defendant) was employed by Wells Fargo, in one of its Charlotte offices. During her employment, defendant received from Wells Fargo a company credit card. Over several months in 2015, defendant used the company card for various personal expenses, without the knowledge or permission of her employer. During an interview with a Wells Fargo investigator, she admitted that she had used the company card for personal use, and that she knew it was against policy to do so. On 27 June 2016, the Mecklenburg Grand Jury indicted defendant for embezzlement of funds and malfeasance of a corporate officer or agent, both stemming from fraudulently using $38,627 for personal uses and initially lying to the company about how the funds were applied.

The matter proceeded to trial, and at the close of the State's evidence, defendant moved to dismiss the charges. Defendant argued that the State had failed to prove every element of the offenses charged, specifically that the State had not presented the actual credit card or credit card number as evidence. Defendant also argued that the only billing addresses in this case were in Iowa and California, and therefore there was no basis to establish jurisdiction in North Carolina. Rather than immediately respond to defendant's motion, the trial court recessed for the weekend. Upon resuming Monday morning, the court permitted the State to respond to defendant's arguments. After hearing arguments from both sides, the trial court denied the motion to dismiss. Defendant declined to present evidence, and renewed her motion to dismiss, which the trial court again denied.

The matter proceeded to the jury charge conference, at which time defendant requested a special instruction on jurisdiction. Specifically, defendant argued that the question of jurisdiction was a factual one – whether the State presented any evidence at all to support jurisdiction in North Carolina – and not a legal one. After hearing arguments on this issue, the trial court denied defendant's request for the special instruction, holding that there was no "issue of fact as to the crime being committed in North Carolina based on the theory of the scheme to commit the embezzlement."

The jury was subsequently instructed, and returned verdicts finding defendant guilty of both embezzlement and corporate malfeasance. The trial court consolidated the charges for judgment, and sentenced defendant to a suspended sentence of 24 months of unsupervised probation.

Defendant appeals.

II. Motion to Dismiss

In her first and second arguments, defendant contends that the trial court erred in denying her motion to dismiss. We disagree.

A. Standard of Review

"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). "'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.'" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any

contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), cert. denied, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

B. Evidence

First, defendant argues that the State did not present evidence of every element of embezzlement. This Court has held that N.C. Gen. Stat. § 14-90 defines the elements of embezzlement as follows:

> 1) that the defendant, being more than 16 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 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).

Defendant contends that the State failed to prove the second element, namely that defendant "received" money or property from Wells Fargo, which she then wrongfully appropriated. In support of this argument, defendant cites this Court's decision in *State v. Palmer*, in which we observed that, "[t]o be guilty of embezzlement, a defendant 'must have been entrusted with and *received into his possession lawfully* the personal property of another[.]'" *State v. Palmer*, 175 N.C. App. 208, 209, 622 S.E.2d 676, 677 (2005) (quoting State *v. Weaver,* 359 N.C. 246, 255, 607 S.E.2d 599, 604 (2005)) (emphasis in original). In *Palmer*, the defendant fraudulently misrepresented her identity to obtain checks, which she then used

without authorization. This Court held that, as she was not entrusted with those checks but in fact obtained them by misrepresentation, she was not in lawful possession of the checks; the appropriate charge was therefore larceny, not embezzlement. *Id*. at 213, 622 S.E.2d at 680.

In the instant case, defendant contends, as she did at trial, that there was no evidence that she was in lawful possession of a Wells Fargo credit card, such that her improper and personal use thereof would be embezzlement. However, the State did present evidence that defendant was in lawful possession of a Wells Fargo credit card. The State presented the testimony of Mary Beth Robinson (Robinson), a vice president of meetings and events at Wells Fargo. Robinson hired and managed defendant from 2013 to 2015. Robinson testified as to the policies concerning company credit card use. She further testified that, when defendant was hired, she received a company card, along with an email containing policies concerning its use. The State also presented the testimony of Yvonne Kilian (Kilian), an internal investigator with Wells Fargo. Kilian described a conversation with defendant concerning the charges on a Wells Fargo card, made by defendant. During that conversation, according to Kilian, defendant "verbally admitted to using the corporate card for personal use, for her and another person, an individual." This testimony was introduced without objection.

This evidence, taken in the light most favorable to the State and giving the State the benefit of every reasonable inference, tends to show that defendant received a Wells Fargo company credit card upon being hired, that she was aware that it could only be used for corporate purposes, and that she nonetheless used it for personal purposes. This would permit a jury to find that defendant was in lawful possession of the credit card – that is, that she did not fraudulently obtain it, but was in fact entrusted with its use as an agent of Wells Fargo – and that she then "misapplied or converted" the card for her own uses. The State therefore presented evidence of this element sufficient to withstand a motion to dismiss. Accordingly, the trial court did not err in denying defendant's motion to dismiss on the basis of insufficient evidence of each essential element of the offense of embezzlement.

Defendant offers similar arguments with respect to the charge of corporate malfeasance. Specifically, defendant argues that she did not "make an entry" in a book, report, or statement belonging to Wells Fargo, and that such an "entry" is an essential element of the charge. However, this is a misstatement of the elements of that charge. Rather, an employee engages in corporate malfeasance if she

> shall embezzle, abstract or willfully misapply any of the moneys, funds or credits of the corporation, or shall, without authority from the directors, issue or put forth any certificate of deposit, draw any order or bill of exchange, make any acceptance, assign any note, bond, draft, bill of exchange, mortgage, judgment or decree, or make 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) (2019). Notably, this statute does not merely concern when an agent "make[s] any false entry," but also when one "willfully misapply[ies] any of the moneys, funds, or credits of the corporation[.]"

In the instant case, defendant is charged with corporate malfeasance on the basis of using a company credit card for personal use. That is the definition of misapplying "moneys, funds, or credits of the corporation." As we held above, the State did indeed present evidence of such willful misapplication of funds. Accordingly, the trial court did not err in denying defendant's motion to dismiss on the basis of insufficient evidence of each essential element of the offense of corporate malfeasance.

C. Jurisdiction

Next, defendant contends that the trial court erred in denying the motion to dismiss for lack of subject matter jurisdiction. Defendant argued at trial, and contends on appeal, that the events at issue did not take place in North Carolina. Defendant notes that, at all relevant times, she reported to a corporate headquarters in Iowa; that after her hiring she moved to South Carolina; that the charges concerned South Carolina and New York; and that the authorization signature on the credit card was allegedly emailed with a California address. Defendant argues that, "[a]t best, the State showed someone purporting to be Defendant undertook the

essential acts forming alleged crimes in South Carolina and New York, and Defendant possessed a duty to account to someone in Iowa. The charge leveled against Defendant had no connection to North Carolina, thus the trial court could not exercise jurisdiction."

The charges at issue concerned two events: One, a catered event, and the other, a hotel stay. With regard to the catered event, defendant contends that this was scheduled in South Carolina. However, the State correctly notes that the catered event was held in Charlotte, North Carolina; the food was prepared there, and defendant's corporate card was run there. Indeed, defendant conceded as much in closing arguments, acknowledging that "I think the law shows the State has met their elements, and somebody testified that that charge, that card was run in Mecklenburg County. I think that's jurisdiction with respect to that."

Moreover, with respect to both the catering and hotel charges, the State correctly notes North Carolina's "duty to account" doctrine. "Under this doctrine, territorial jurisdiction of a prosecution for embezzlement may be exercised by the state in which the accused was under a duty to account for the property." *State v. Tucker*, 227 N.C. App. 627, 633-34, 743 S.E.2d 55, 59 (2013) (citations and quotation marks omitted). By way of illustration, in *State v. Carter*, the defendant entered into an agreement in Robeson County and obtained property there; he then departed Robeson and completed his conversion of the property elsewhere. Our Supreme Court

held that, "as the contract was made in Robeson by which the defendant came into possession of this property, that it was delivered to him and he received the same in Robeson county, and that he was to return it to the prosecutor from whom he got possession, or to account for and pay over the proceeds to the prosecutor in Robeson county, that Robeson county also had jurisdiction of the offense." *State v. Carter*, 126 N.C. 1011, 35 S.E. 591, 592 (1900).

In the instant case, although defendant reported to a corporate office in Iowa and moved to South Carolina, she was hired in Charlotte, North Carolina in 2013. She was based in Charlotte and in 2015 Wells Fargo gave her an office there. Defendant was issued a corporate card at the time of her hiring, and agreed to the terms and conditions of the card, in Charlotte. Her email signature identified Charlotte as her work location. In short, it is abundantly clear that, regardless of where defendant was physically, she was headquartered in North Carolina and represented herself to be such. More importantly, she made her contract with Wells Fargo and received the property – the company credit card – in North Carolina. Again giving the State the benefit of every reasonable inference, it is clear that the State presented evidence that defendant was under a duty to account for her expenses in North Carolina, thus granting this State jurisdiction. Accordingly, the trial court did not err in denying defendant's motion to dismiss the charges based upon a lack of jurisdiction.

III. Jury Instruction

In her third argument, defendant contends that the trial court erred in denying her request for a special jury instruction on jurisdiction. We disagree.

A. Standard of Review

"A specific jury instruction should be given when '(1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury.' " *Outlaw v. Johnson*, 190 N.C. App. 233, 243, 660 S.E.2d 550, 559 (2008) (quoting *Liborio v. King*, 150 N.C. App. 531, 534, 564 S.E.2d272, 274, *disc. review denied*, 356 N.C. 304, 570 S.E.2d 726 (2002)).

B. Analysis

During the jury charge conference, defendant requested "the special instruction on jurisdiction." This instruction, N.C.P.I.-Crim. 311.10, permits the jury to consider whether the alleged offense was committed in North Carolina, and therefore whether the trial court has jurisdiction. The trial court considered the matter, and whether the issue was one of fact or of law, before concluding that this was not an issue of fact, and denying the request. On appeal, defendant contends that this was error.

We addressed similar facts in *Tucker*. In that case, the defendant, a delivery driver hired by a North Carolina company, received payment in cash, which he did not remit back to the company. He had picked up his shipment in Washington, delivered goods in Nevada, and then drove to Arizona, where he spent some of the cash payment on a plane ticket home. At trial, he moved to dismiss the charge of embezzlement on the grounds of jurisdiction, which the trial court denied. *Tucker*, 227 N.C. App. at 629, 743 S.E.2d at 56-57. On appeal, he also argued that the trial court erred in denying his request for an instruction on jurisdiction. This Court acknowledged that, when the facts of jurisdiction are challenged, the trial court "is required to instruct the jury that (1) the State has the burden of proving jurisdiction beyond a reasonable doubt; and (2) if the jury is not satisfied, it should return a special verdict indicating a lack of jurisdiction." *Id*. at 637, 743 S.E.2d at 61.

However, we went on to hold that, where the challenge "is not to the factual basis for jurisdiction but rather to the *theory* of jurisdiction relied upon by the State, the trial court is not required to give these instructions since the issue regarding [w]hether the theory supports jurisdiction is a legal question for the court." *Id*. at 637, 743 S.E.2d at 61-62 (citation and quotation marks omitted). We further held that:

> While defendant attempts to portray his jurisdictional argument as one involving a factual dispute, this characterization is incorrect. Defendant's argument is that jurisdiction lies solely in the state where defendant either

> (1) lawfully obtained possession of his principal's property with fraudulent intent; or (2) misapplied or converted the funds for his own use. This argument involves a legal issue rather than a factual one. Defendant and the State disagreed about which *theory* of jurisdiction should be applied to determine whether North Carolina's courts had territorial jurisdiction to prosecute defendant for embezzlement. As addressed above, the facts relevant to the application of the duty to account doctrine were uncontested.

Id. at 637-38, 743 S.E.2d at 62.

We therefore concluded that the defendant's argument was a legal one, not a factual one, and that the trial court was not required to instruct the jury on jurisdiction. *Id*. at 638, 743 S.E.2d at 62.

In the instant case, as in *Tucker*, the facts are uncontested as to where events transpired. It is undisputed that the employers at Wells Fargo to whom defendant reported were headquartered in Iowa, that the catering business defendant used in Charlotte was located in South Carolina, and that the hotel in which defendant stayed was located in New York. Defendant's argument, rather, is with the State's theory of jurisdiction – the duty to account – which permits this State to exercise jurisdiction regardless of those facts, provided that defendant was under a duty to account in North Carolina. As in *Tucker*, this is a legal issue for the trial court to resolve, not a factual issue for the jury. Accordingly, the trial court did not err in denying defendant's request for a special instruction on jurisdiction.

IV. Evidentiary Error

In her fourth argument, defendant contends that the evidentiary errors committed by the trial court, individually or collectively, sufficiently prejudiced her defense that a new trial is warranted. We disagree.

A. Standard of Review

"Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893, *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001).

B. Analysis

Defendant specifically raises four arguments with respect to evidence at trial: first, that various objections which were overruled should have been sustained; second, that specific hearsay objections should have been sustained; third, that defendant's best evidence objection should have been sustained; and fourth, that the cumulative effect of these errors prejudiced defendant and mandates a new trial.

In her first point, defendant argues that the trial court improperly admitted "irrelevant job-performance evidence[,]" namely that Wells Fargo disciplined defendant for her job performance, and evidence of "other crimes" for which defendant was neither indicted nor tried, namely several unauthorized financial charges unrelated to the ones which led to the criminal charges against defendant. Defendant

argues that the trial court's error in admitting these was "not harmless beyond a reasonable doubt[,]" or in the alternative "constituted plain error."

Notwithstanding defendant's arguments, however, she cannot show prejudice from the introduction of this evidence. The evidence at trial was clear: Wells Fargo issued defendant a credit card, which she used for personal purposes. This is both necessary and sufficient to permit a jury to convict defendant. Even assuming *arguendo* that details pertaining to her job performance or other, unrelated financial charges were improperly considered, defendant has not shown that absent their admission, "a different result would have been reached at trial."

Similarly, defendant argues that statements made by Robinson were double hearsay, in that Robinson testified regarding out-of-court statements made by Robert Freeman (Freeman), the caterer hired by defendant, who in turn was commenting on what defendant may have told him. These hearsay statements concerned defendant allegedly arranging the catering event. However, even assuming *arguendo* that Robinson's testimony on this point was erroneously admitted, Freeman himself then testified, without objection, about his meetings with defendant for the purpose of catering her event. As such, the testimony was admitted, and would have been admitted even without Robinson's hearsay. As a result, defendant cannot show that absent its admission, "a different result would have been reached at trial."

Defendant argues that the trial court erred in admitting various emails purporting to show defendant engaging in unauthorized transactions. Even assuming *arguendo* that the emails themselves were erroneously admitted, however, there was ample witness testimony concerning the facts underlying these emails. As such, defendant cannot show that absent their admission, "a different result would have been reached at trial." Likewise, defendant argues that the trial court erred in admitting Kilian's notes on expense reports, rather than the expense reports themselves. Defendant argues that the reports were the best evidence of their contents. However, once again, Kilian herself testified as to the facts underlying her notes. As the evidence was admitted, and would have been admitted even without the notes, defendant cannot show prejudice as a result.

Finally, defendant contends that even if none of these errors was individually prejudicial, their cumulative impact was nonetheless sufficiently prejudicial to deny defendant of a fair trial. However, defendant has not in fact shown any prejudice resulting from these errors individually, and we do not find that any prejudice resulted from them cumulatively. Accordingly, we hold that the trial court's evidentiary rulings did not rise to the level of prejudicial error or plain error.

V. Variance in the Indictment

In her fifth argument, defendant contends that there was a fatal variance between the indictment against her and the proof offered at trial. We disagree.

A. Standard of Review

We review the issue of a fatal variance in an indictment *de novo*. *State v. Cheeks*, ___ N.C. App. ___, ___, 833 S.E.2d 660, 681 (2019), *disc. review allowed*, ___ N.C. ___, 839 S.E.2d 339 (2020).

B. Analysis

At the close of the State's evidence, defendant moved to dismiss the charges "on the grounds that the variance between the allegations in the indictment and the proof at trial was fatal to the State's prosecution." She contends that the trial court erred in denying this motion.

Defendant's indictment alleged that she misapplied $38,627. Defendant, in her motion to dismiss, argued:

> [T]here is a gigantic void with represent to -- so the State is alleging in that indictment that there is 38,000 -- I can't remember the exact number that it was. They close their evidence, and in their own admission the amount of money which is being alleged to have been embezzled in this case doesn't meet that amount. In fact, they haven't submitted anything specific as to even close to that amount in their -- in their charging instrument.

"A variance occurs where the allegations in an indictment, although they may be sufficiently specific on their face, do not conform to the evidence actually established at trial." *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002). However, "[a] variance is not material, and is therefore not fatal, if it does not involve an essential element of the crime charged." *Id*. As the only purported variance raised

by defendant concerned how much money defendant allegedly misapplied, the only issue is whether the amount of money misapplied is an essential element of the charges against defendant, such that this constituted a fatal variance.

The statute defining corporate malfeasance makes no reference to an amount of money or value of goods misapplied whatsoever. It merely states that an agent of a corporation who "shall embezzle, abstract or willfully misapply any of the moneys, funds or credits of the corporation, or shall, without authority from the directors, issue or put forth any certificate of deposit, draw any order or bill of exchange, make any acceptance, assign any note, bond, draft, bill of exchange, mortgage, judgment or decree, or make 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," or who aids another in doing so, is guilty of a Class H felony. N.C. Gen. Stat. § 14-254. The statute defining embezzlement makes only one reference to amount – if the amount embezzled is $100,000 or more, the offense is a Class C felony, otherwise it is a Class H felony. N.C. Gen. Stat. § 14-90(c). Otherwise, as with the statute on corporate malfeasance, it makes no reference to amount.

Defendant contends, and we have held, that "the purpose of an indictment is to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial[.]" *State v. Thrift*, 78 N.C. App. 199, 201, 336 S.E.2d 861, 862 (1985). In the instant case, however, the offenses with which

defendant was charged were not dependent upon the amount of money misapplied. That is, a jury would be able to find defendant guilty of the offenses charged whether she embezzled $50 or $50,000. That the State may not have presented sufficient evidence to support the specific amount of $38,627, as alleged in the indictment, is indeed a variance. However, because it does not concern an essential element of the charges, this variance is not fatal to the indictment and the charges against defendant.

Defendant also references additional evidence, which she contends is not relevant to the offenses charged and therefore prejudicial. As we have held above, however, the admission of this evidence was not prejudicial. Moreover, the problem of a fatal variance in an indictment is not a question of *excessive* evidence, but *insufficient* evidence, and therefore an argument that erroneous additional evidence was admitted is not relevant to the question of whether the indictment suffered from a fatal variance.

For all these reasons, we hold that the trial court did not err in denying defendant's motion to dismiss the charges on the basis of a purportedly fatal variance in the indictment.

NO ERROR.

Judges DILLON and ARROWOOD concur.

Report per Rule 30(e).