THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2017-0328, State of New Hampshire v. Keith C. Fitzgerald, the court on July 6, 2018, issued the following order:

The defendant, Keith C. Fitzgerald, appeals his convictions on five counts of theft by unauthorized taking. See RSA 637:3 (2016). He challenges the validity of the indictments. He also contends that: (1) the Trial Court (Smukler, J.) erred in allowing hearsay statements allegedly made by the victim to be admitted into evidence; (2) the evidence was insufficient to support his convictions; and (3) the trial court erred in sentencing him to an extended term pursuant to RSA 651:6, because the indictments failed to allege extended term elements. We affirm.

Each of the indictments charged the defendant with the unauthorized taking or transfer of assets belonging to his father. The charges were based upon transactions that he made in 2010 using his father's assets, without the knowledge of his father or the defendant's siblings. On appeal, the defendant does not contest that the transactions happened; he concedes that "they occurred at the time, at the place, and in the manner the State alleges."

The defendant argues, however, that the five indictments were multiplicitous because they "allege transactions that are essentially the same — going from and to the same bank accounts, and concerning the same alleged victim" and differ only in describing "how the money was spent." Based upon this assertion, he argues that the indictments, and his convictions and sentences, violate the protections found in the State and Federal Constitutions against Double Jeopardy.

The defendant cites two pages from the transcript of the sentencing hearing to support his assertion that he raised this issue before the trial court. We have reviewed those pages and conclude that he did not present at that hearing the argument that he now seeks to advance on appeal. We therefore conclude that the issue has not been preserved for appellate review. See, e.g., State v. Legere, 157 N.H. 746, 764 (2008) (contemporaneous and specific objection must be made in trial court to preserve issue for appellate review).

The defendant also challenges the validity of Indictment 57, which charged the defendant with unauthorized control of the victim's property, based upon the execution of checks in excess of $1000.00. Indictment 57 alleged that the defendant "executed checks drawn on one or more accounts at Wachovia Bank, which he deposited or caused to be deposited in an account at Meredith Village

Savings Bank." The defendant argues that none of these transactions "resulted in the deprivation of [the victim's] control, because Indictment 57 charges [the defendant] with theft of money that was . . . already appropriated." Although the defendant asserts that this issue was raised in the trial court and has provided a citation to the trial transcript that allegedly supports this assertion, we conclude that the arguments presented in the cited exchange did not alert the trial court to the statutory construction argument that the defendant now advances on appeal. This argument has therefore not been preserved. See id.

The defendant also argues that the trial court erred in admitting an out-of-court statement made by his father. He cites the following testimony:

> Q: Was anything else discussed during that conversation beyond the house and jewelry issues?
>
> A: Yes. My father was on a roll. The conversation pivoted rather quickly at the end to my father asking Keith where all his money was.
>
> Q: To the best of your recollection, what words did your father use to ask Keith where his money was?
>
> A: You'll tell me where the money is.
>
> Q: That was to the best of your recollection what your father said to the defendant?
>
> A: Yes.
>
> Q: Did the defendant respond?
>
> A: Yes.
>
> Q: What did he say?
>
> A: To the best of my recollection, his wording was similar to "any time you want to know where it is, dad, I'll tell you."

The defendant argues that, given its context, the statement, "You'll tell me where the money is" constituted hearsay. Even if we assume, without deciding, that the cited statement constituted hearsay, see, e.g., State v. Bennett, 144 N.H. 13, 18 (1999) (concluding that out-of-court query that was introduced to establish lack of knowledge was offered for its truth and thus constituted hearsay), we conclude that any error in its admission was harmless.

An error is harmless only if it is determined, beyond a reasonable doubt, that the verdict was not affected by the error. State v. Palermo, 168 N.H. 387, 399 (2015). The State bears the burden of establishing that an error is harmless. Id. An error may be harmless if the alternative evidence of the defendant's guilt is of an overwhelming nature, quantity or weight, and if the inadmissible evidence is merely cumulative or inconsequential in relation to the strength of the State's evidence of guilt. Id. In determining whether an error was harmless, we consider the alternative evidence presented at trial as well as the character of the inadmissible evidence. Id.

The defendant argues that admission of the cited statement was prejudicial because it negated his defense that the transactions were authorized by his father; he asserts that the statement "was the baldest instance of [his] supposed lack of authorization." We are not persuaded by this argument. Evidence presented to the jury included that: (1) the power of attorney executed by his father specifically stated that the defendant was to act jointly "and not separately" with his brother, who was his co-attorney in fact; (2) the defendant made multiple transfers of his father's assets without advising his brother of his actions; and (3) the defendant's father sent, or caused to be sent, several e-mails to the defendant that requested an accounting of the father's assets. Accordingly, even if the cited statement was inadmissible, it was inconsequential in relation to the strength of the State's evidence of guilt and any error in admitting it was harmless. See id.

The defendant also argues that the State failed to present sufficient evidence to support his convictions. He contends that the evidence presented was solely circumstantial that he "conducted the charged transactions." Alternatively he argues that "the record suggests that" his father was aware of the defendant's "financial predicament" and authorized the defendant's use of his money.

To prevail upon a challenge to the sufficiency of the evidence, the defendant must demonstrate that no rational trier of fact, viewing all of the evidence and all reasonable inferences from it in the light most favorable to the State, could have found guilt beyond a reasonable doubt. State v. Fiske, 170 N.H. 279, 288 (2017). Circumstantial evidence may be sufficient to support a finding of guilty beyond a reasonable doubt. Id. When the evidence is solely circumstantial, it must exclude all reasonable conclusions except guilt. State v. Morrill, 169 N.H. 709, 719 (2017). Under this standard, however, we still consider the evidence in the light most favorable to the State and examine each evidentiary item in context, not in isolation. Id. Further, the trier of fact may draw reasonable inferences from facts proved and also inferences from facts found as a result of other inferences, provided they can be reasonably drawn therefrom. Fiske, 170 N.H. at 288.

The evidence presented to the jury included, but was not limited to: (1) e-mail exchanges between the defendant and his siblings in which he stated that he was investing his father's funds at his father's request; (2) testimony by his siblings that they had no knowledge of the transactions and had requested that he explain his actions; and (3) the defendant's trial testimony in which he admitted that he withdrew his father's funds. Accordingly, we conclude that the defendant has failed to carry his burden in his challenge to the sufficiency of the evidence.

Finally, the defendant argues that, because the indictments failed to allege extended term elements, the trial court erred in sentencing him to an extended term. He concedes that he did not alert the trial court to this alleged error and asks that it be reviewed under our plain error rule. See Sup. Ct. R. 16-A. Under the plain error rule, we may consider errors not raised before the trial court. State v. Fiske, 170 N.H. 279, 290 (2017). However, the rule should be used sparingly, its use limited to those circumstances in which a miscarriage of justice would otherwise result. Id. at 290-91. To find plain error: (1) there must be an error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings. Id. at 291. The defendant bears the burden of demonstrating plain error. Id.

RSA 651:6, III (2016) provides that a defendant may be sentenced to an extended term of imprisonment if authorized by statute and if the defendant receives notice of the possible application of the statute at least 21 days prior to the commencement of jury selection. The trial court imposed an extended term of imprisonment pursuant to RSA 651:6, I (l) (2016) based upon the age of the victim. The defendant does not contest the factual basis for the imposition of the enhanced sentence; rather, he argues that the trial court "constructively amended the indictments" to add the enhanced sentencing element.

The record before us includes copies of the indictments, each of which cite RSA 651:6. In January 2016, more than a year before trial, the State sent to defense counsel a letter, which, inter alia, notified the defendant "of the possible application of RSA 651:6 to each of the five indictments in this case based on RSA 651:6, I (l)." At the close of the evidence, the trial court instructed the jury as follows:

> If, and only if, you find that the State has satisfied its burden on any of the indictments, you will go on to consider whether the State has also proved the following two elements beyond a reasonable doubt. First, that Clifford L. Fitzgerald, Jr. was 65 years of age or older or had a physical or mental disability, and second, in perpetrating the crime, the defendant intended to take advantage of Clifford L. Fitzgerald, Jr.'s age or a physical or mental condition that impaired Clifford L. Fitzgerald, Jr.'s ability to

manage his property or financial resources or to protect his rights or interests.

If you find that the State has failed to prove these two elements beyond a reasonable doubt you will answer no to the question about these elements that the clerk of court will ask you.

In his reply brief, the defendant emphasizes that his argument about the constructive amendment of the indictments is based upon "the authority of juries, not about notice." In State v. Marshall, 162 N.H. 657 (2011), we observed that whether the Federal and State Constitutions require that sentence enhancement factors be alleged in an indictment is an open question. State v. Marshall, 162 N.H. 657, 664-65 (2011). Moreover, the Federal Grand Jury Clause does not apply to the states. Id. at 665. Accordingly, we conclude that, to the extent that the trial court may have erred in imposing an extended sentence, any error was not plain. See, e.g., Noucas, 165 N.H. 146, 161 (2013) (error is plain if governing law was clearly settled to the contrary at time action was taken).

Affirmed.

HICKS, HANTZ MARCONI, and DONOVAN, JJ., concurred.

Eileen Fox,
Clerk