NO. COA02-241

NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2002

STATE OF NORTH CAROLINA

v. Pasquotank County
No. 00 CRS 2942

CHARLES ERVIN McGILBERRY

Appeal by defendant from judgment entered 22 May 2001 by Judge Ronald E. Spivey in Superior Court, Pasquotank County. Heard in the Court of Appeals 30 September 2002.

Attorney General Roy Cooper, by Assistant Attorney General M. Lynne Weaver, for the State.

Paul Pooley for defendant-appellant.

McGEE, Judge.

Defendant was found guilty of obtaining property by false pretenses and was sentenced within the mitigated range to imprisonment for a minimum of seven months and a maximum of nine months.

The State presented evidence at trial tending to show that at approximately 9:30 a.m. on 11 July 2000, defendant entered the electronics department of a K-Mart store in Elizabeth City, North Carolina. Doris Wise, the electronics department manager, assisted defendant with the selection of a video cassette recorder (VCR). Defendant paid cash for the VCR, which was priced at $89.99, at Ms.

Wise's register. Defendant walked out of the store carrying his purchase in a bag provided by Ms. Wise.

Approximately five to ten minutes later, defendant returned to the store. Carrying nothing in his hands, he walked past Ms. Wise. Ms. Wise next saw defendant walking down the aisle and carrying a VCR identical to the one he had just purchased and a bag. Defendant approached and asked Ms. Wise for a refund. Ms. Wise directed defendant to go to the service desk at the front of the store to receive a refund. Meanwhile, Ms. Wise observed that a VCR was missing from the bottom shelf. Ms. Wise was also aware that no purchases had been made from the electronics department since the time defendant made his purchase. As defendant walked to the service desk, Ms. Wise alerted the service desk attendant as to what she had observed. The service desk attendant asked defendant to complete paperwork while she awaited the arrival of police.

Defendant did not present any evidence.

Defendant first contends the trial court erred by denying his motion to dismiss. In deciding a motion to dismiss, a court must determine whether there is substantial evidence (1) of each essential element of the charged offense, and (2) that defendant was the perpetrator. *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). The court must view the evidence in the light most favorable to the State, giving it the benefit of every reasonable inference that may be drawn from the evidence. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). In evaluating the evidence, the trial court is to determine only

whether the evidence is sufficient to allow the jury to draw a reasonable inference of the defendant's guilt of the crime charged. *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982).

The offense of obtaining property by false pretenses is defined in N.C. Gen. Stat. § 14-100(a) (1999) in pertinent part as follows:

> (a) If any person shall knowingly and designedly by means of any kind of false pretense whatsoever, whether the false pretense is of a past or subsisting fact or of a future fulfillment or event, obtain or attempt to obtain from any person within this State any money, goods, property . . . or other thing of value with intent to cheat or defraud any person of such money, goods, property . . . or other thing of value, such person shall be guilty of a felony[.]

Defendant contends that the trial court should have granted his motion because the evidence failed to show that anyone was actually deceived by defendant into parting with any money, goods, property or thing of value.

The statute makes it a crime to "obtain or attempt to obtain" from any person money, goods or any thing of value by any kind of false pretense. N.C. Gen. Stat. § 14-100(a). The offense is therefore complete once the attempt is made to take the property of another by the means of a false pretense, even when the victim is not fooled or deceived. For example, in *State v. Armstead*, 149 N.C. App. 652, 562 S.E.2d 450 (2002), our Court held that the offense was committed when a store cashier declined to believe the defendant's claim that an initialed check had been "pre-approved." We also held that language in the indictment that the false

pretense "did deceive" was mere surplusage. *Id.* Similarly, in *State v. Wilburn*, 57 N.C. App. 40, 290 S.E.2d 782 (1982), the defendant approached a store owner and offered to obtain for the store owner merchandise normally valued at $40,000 for the sum of only $17,450. The defendant directed the store owner to deliver the money to a particular individual at a designated location. The store owner became suspicious and contacted law enforcement officers. An officer of the State Bureau of Investigation accompanied the store owner to the designated delivery point. The defendant refused to show the agent and the store owner the goods without first receiving money. In affirming the defendant's conviction of attempted taking of property by false pretenses, this Court stated that it was not necessary to show the store owner was actually deceived. This argument is overruled.

Defendant next contends that the trial court erred in instructing the jury that it was not necessary for the victim to actually be deceived. Defendant did not object to the trial court's instructions and he has not assigned plain error to them. In order to obtain appellate review of an alleged instructional error, the defendant must specifically and distinctly contend by assignment of error and argument in his brief that the alleged instructional error amounted to plain error. *See* N.C.R. App. P. 10(c)(4); *see also State v. Nobles*, 350 N.C. 483, 514-15, 515 S.E.2d 885, 904 (1999); *State v. Truesdale*, 340 N.C. 229, 232-33, 456 S.E.2d 299, 301 (1995). This contention is therefore not properly before this Court.

Defendant's remaining argument is that the trial court erred by failing to submit to the jury the offense of attempted larceny. Defendant did not request the instruction and he did not object to the instructions that were given by the trial court. He acknowledges the lack of objection but argues an objection was not necessary because of N.C. Gen. Stat. § 15A-1446(d)(13), which states an instructional error may be asserted on appeal in the absence of an objection. Alternatively, he contends the court committed plain error.

In *State v. Bennett*, 308 N.C. 530, 302 S.E.2d 786 (1983), our Supreme Court held that rules of practice and procedure adopted by the Court supersede statutory provisions. Therefore, given the lack of an objection, any review in this case is for plain error. To establish plain error, the defendant must show that the error is so fundamental that justice could not have been done. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). This showing has not been made in this case. The failure to submit an offense to the jury is not error when there is no evidence from which the jury may find commission of the offense. *State v. Peacock*, 313 N.C. 554, 558, 330 S.E.2d 190, 193 (1985).

The elements of larceny are that the defendant (1) took the property of another, (2) carried it away, (3) without the other's consent, and (4) with the intent permanently to deprive the owner of the property. *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982). One of the key elements of obtaining property by false pretenses, which is not an element of larceny, is that an

intentionally false and deceptive representation was made. All of the evidence in this case shows defendant attempted to obtain property, being a refund, by means of an intentionally false and deceptive representation made by him. The trial court thus did not err by not instructing the jury on attempted larceny.

For the foregoing reasons, we find no error.

No error.

Judges WYNN and CAMPBELL concur.

Report per Rule 30(e).