NO. COA02-261

NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2002

STATE OF NORTH CAROLINA

v. Wilson County
Nos. 99 CRS 55069, 55074

DAVID TYRONE PERRY

Appeal by defendant from judgments entered 19 September 2001 by Judge Thomas D. Haigwood in Wilson County Superior Court. Heard in the Court of Appeals 28 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General Mary Penny Thompson, for the State.

Angela H. Brown for defendant-appellant.

EAGLES, Chief Judge.

David Tyrone Perry ("defendant") appeals from judgments entered on the jury verdicts finding him guilty of obtaining property by false pretenses and attempting to obtain property by false pretenses. After careful consideration of the briefs and record, we discern no error.

The State's evidence tended to show that on 26 May 1999, defendant cashed a check in the amount of $1,400.15 at Centura Bank in Wilson, North Carolina. This check listed Visions, Incorporated as the drawer and David Perry as the payee. The check subsequently

"came back" to the bank. Defendant was not an employee of Visions, Inc. In addition, all Visions, Inc. paychecks were blue while the check cashed by defendant on 26 May 1999 was pink. Defendant returned to the bank on 30 June 1999 and attempted to cash a second check which listed Saturn Electronics and Engineering, Incorporated as the drawer. However, the bank's service leader, Sharon Rouse, remembered defendant from the previous transaction on 26 May 1999. Rouse did not cash the Saturn check for defendant. Significantly, the check presented by defendant for cashing was different in color from all other Saturn checks and it lacked the Saturn logo that was present on every Saturn check. A bank employee called the police.

Officer Phillip Flood, of the Wilson Police Department, responded to the call for assistance. After Rouse explained to him the circumstances, Officer Flood approached defendant and asked him if he would come down to the police station and speak with a detective about the matter. Defendant was cooperative but became extremely nervous and agitated -- sweating profusely and his heart visibly pounding through his shirt. Detective J.B. Gibson of the Wilson Police Department questioned defendant at the police station. Defendant stated that he had received the checks in the mail and assumed that they were payment for his services stuffing envelopes for a mail order company. Defendant was charged with two counts of obtaining property by false pretenses and one count of attempting to obtain property by false pretenses.

Upon defendant's motion to dismiss at the close of the State's evidence, the trial court dismissed one count of obtaining property

by false pretenses. Defendant then presented evidence which tended to show that the checks he presented at the Centura Bank were sent to him in a plain white envelope, postmarked 28 May 1999. He was unable to explain on cross-examination how he cashed one of those checks two days before the postmark date. Defendant testified that he did not know who sent the checks.

The trial court denied defendant's motion to dismiss the two remaining charges at the close of all of the evidence. The jury returned verdicts finding defendant guilty of the two charges. The trial court entered judgment on those verdicts and sentenced defendant to a 60-day active sentence, suspended defendant's two consecutive 6-8 month sentences and placed him on supervised probation for 36 months. Defendant appeals.

Defendant has not brought forth his first assignment of error. Accordingly, it is abandoned. *See* N.C. R. App. P. 28(b)(6).

By his second assignment of error, defendant argues that the trial court erred in denying his motion to dismiss at the close of all the evidence based upon insufficient evidence. We disagree.

In ruling on a motion to dismiss, the trial court must determine "'whether the evidence is legally sufficient to support a verdict of guilty on the offense charged, thereby warranting submission of the charge to the jury.'" *State v. Walston*, 140 N.C. App. 327, 331, 536 S.E.2d 630, 633 (2000) (quoting *State v. Thomas*, 65 N.C. App. 539, 541, 309 S.E.2d 564, 566 (1983)). The motion is properly denied if "there is substantial evidence of each essential element of the offense charged and of the defendant being the

perpetrator of such offense." *State v. Serzan*, 119 N.C. App. 557, 560, 459 S.E.2d 297, 300 (1995), *cert. denied*, 343 N.C. 127, 468 S.E.2d 793 (1996). When considering a motion to dismiss, the trial court should consider the evidence in the light most favorable to the State, giving the State all of the reasonable inferences to be drawn therefrom. *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998).

To obtain a conviction of obtaining (and/or attempting to obtain) property by false pretenses the State must show that the defendant made "'(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another.'" *State v. Hutchinson,* 139 N.C. App. 132, 138, 532 S.E.2d 569, 573 (2000) (quoting *State v. Cronin,* 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980)); *see also* G.S. § 14-100(a) (2001). The presentation of a worthless check in exchange for property has been held to be a sufficient misrepresentation to sustain a conviction for obtaining property by false pretenses. *State v. Rogers*, 346 N.C. 262, 264, 485 S.E.2d 619, 621 (1997). Intent to deceive is a key element of the offense, but a mental attitude is "'seldom provable by direct evidence.'" *Walston*, 140 N.C. App. at 332, 536 S.E.2d at 633 (quoting *State v. Compton*, 90 N.C. App. 101, 104, 367 S.E.2d 353, 355 (1988)). The defendant's intent must usually be discerned from the facts and attenuating circumstances. *Id.* at 332, 536 S.E.2d at 634. Finally, "[t]o show that a defendant committed the offense of

obtaining property by false pretenses, the State must prove that there is a causal relationship between the alleged false representation and the obtaining of money, property, or something else of value." *Id.* at 333, 536 S.E.2d at 634.

Here, defendant contends that the State failed to establish (1) that he in fact made a false representation, (2) that he possessed the requisite intent to deceive, and (3) that there was a causal relationship between the false representation and the defendant obtaining property. However, upon a thorough review of the record, we conclude that the State established each element of the offenses charged.

In the light most favorable to the State, the evidence tends to show that defendant presented a check drawn on Visions, Inc. and Saturn Electronics and Engineering, Inc. to a teller at Centura Bank in Wilson. The bank teller cashed the Vision check and gave defendant $1,400.15. The Visions check "came back" to the Wilson bank. The bank refused to cash the Saturn Electronics check when defendant came and attempted to cash the check. An employee of the bank called the police and defendant was extremely nervous when approached by the police about this matter. Although defendant contends that he received the checks in the mail and thought them to be payment for his services stuffing envelopes for a mail order company, testimony by employees of Visions and Saturn Electronics established that defendant had never been employed by either company and that the checks he possessed were different from the companies' respective pay checks. Moreover, defendant could not

explain how he cashed one of the checks days prior to its alleged receipt in the mail. At trial, defendant was unable to tell the court who sent him the checks.

On these facts, the State proved that defendant did "knowingly and designedly by . . . false pretense . . . obtain or attempt to obtain . . . money [from employees of Centura Bank] with intent to cheat or defraud [the employees of the bank]" in violation of G.S. § 14-100. *See* G.S. § 14-100(a) (2001). Accordingly, this assignment of error is overruled.

By his third and final assignment of error, defendant argues that the trial court erred in admitting State's Exhibit 1, the check listing Visions, Inc. as the drawer and defendant as the payee, in evidence with the words "counterfeit" marked on it. Defendant contends that the admission violated the hearsay rule as the out-of-court declarant who delineated the check as a counterfeit did not testify. In the event that the evidence was admissible, defendant further contends that the trial court "should have given the jury a limiting instruction requiring that it disregard the extraneous hearsay matter on the face of the check from Visions, Inc."

We note that the record reveals that while defendant did initially object to the admission of the Visions, Inc. check into evidence and that objection was sustained by the court, defendant did not subsequently object when the State again proffered that same check into evidence. This Court has just recently reiterated that "[t]he benefit of an objection is lost when the same or

similar evidence is later admitted without objection." *State v. Holadia*, 149 N.C. App. 248, 256, 561 S.E.2d 514, 520, *writ denied and disc. review denied*, __ N.C. __, 562 S.E.2d 432 (2002). Similarly, despite ample opportunity, defendant failed to object to the court's jury charge or request additional or alternative instructions prior to the jury retiring. Pursuant to N.C. R. App. P. 10(b)(2), that argument is also waived. While N.C. R. App. P. 10(c)(4) permits plain error review in instances where a criminal defendant assigns error to a trial court's evidentiary ruling or jury instruction, Rule 10(c)(4) requires that the defendant "specifically and distinctly" assert that the judicial action in question amounted to plain error. *See* N.C. R. App. P. 10(c)(4). Defendant has not done so here and therefore, this assignment is summarily overruled.

We hold that defendant received a fair trial, free of prejudicial error.

No error.

Judges McCULLOUGH and HUDSON concur.

Report per Rule 30(e).