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NO. COA11-241  
NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 2011

STATE OF NORTH CAROLINA

v.

Caldwell County  
Nos. 10 CRS 1030-31

KEVIN BARRY SURBER

Appeal by defendant from judgment entered 8 July 2010 by  
Judge Timothy S. Kincaid in Caldwell County Superior Court.

Heard in the Court of Appeals 17 October 2011.

*Attorney General Roy Cooper, by Assistant Attorney General  
Scott K. Beaver, for the State.*

*Robert W. Ewing for defendant-appellant.*

McCULLOUGH, Judge.

Kevin Barry Surber ("defendant") appeals from judgment entered upon his convictions for larceny and obtaining property by false pretenses. He contends the trial court erred in denying his motion to dismiss the charge of obtaining property by false pretenses for lack of sufficient evidence. He also argues his sentence enhancement as an habitual felon violates

the Eighth Amendment proscription against cruel and unusual punishment. We find no error.

On 29 March 2010, defendant was indicted for obtaining property by false pretenses, misdemeanor larceny, misdemeanor possession of stolen goods, and habitual felon status. The matter came on for trial on 7 and 8 July 2010. The State's evidence tends to show that on 18 September 2009, defendant visited the Foothills Hunting and Fishing store and inquired about a particular hunting bow which was priced at \$799.00. Defendant did not purchase anything, and the store's owner, Jeff Branch, did not see him leave. After defendant left, Mr. Branch noticed the bow was missing, and saw the tag laying on the floor near the exit. Mr. Branch immediately called the police and started calling other archery stores and pawn shops in the area. He discovered that a bow had been sold to the Whitnel Outdoorsman and Pawn Shop, and the serial number matched the bow that had been stolen from Mr. Branch's store.

Steve Holler, the manager at Whitnel, testified that on 18 September 2009, defendant sold him a hunting bow in exchange for \$200.00 in cash. Mr. Holler was familiar with defendant, who had come in and out of the store for probably five to seven years. He recalled defendant signing a piece of paper acknowledging

that Whitnel "had taken the bow in," although he could not find that piece of paper later on.

Defendant did not present any evidence. He moved to dismiss the charges, and the trial court denied the motion. The jury returned verdicts of guilty of misdemeanor larceny, misdemeanor possession of stolen goods, and felony obtaining property by false pretenses. The trial court arrested judgment on the misdemeanor possession of stolen property conviction. The jury then found defendant guilty of having attained habitual felon status. The trial court consolidated the offenses for judgment and sentenced defendant to an active term of 100 to 129 months' imprisonment. Defendant appeals.

Defendant first argues the trial court erred in denying his motion to dismiss the charge of obtaining property by false pretenses where the State failed to present substantial evidence that he made a false representation, either by word or by action, to the pawn shop manager when he brought the bow in for sale. He contends the mere fact of the sale itself is not sufficient to show that he represented to the pawn shop manager that he either had paid for it, or owned it.

In order to survive a motion to dismiss for insufficient evidence in a criminal trial, the State must present substantial

evidence of (1) each essential element of the charged offense and (2) defendant's being the perpetrator of such offense. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). Substantial evidence includes both direct and circumstantial evidence, and is "evidence from which a rational finder of fact could find the fact to be proved beyond a reasonable doubt." *State v. Davis*, 130 N.C. App. 675, 678, 505 S.E.2d 138, 141 (1998). "'Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal.'" *Id.* at 679, 505 S.E.2d at 141 (quoting *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996)). "In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences" that can be drawn from the evidence. *Fritsch*, 351 N.C. at 378-79, 526 S.E.2d at 455.

Pursuant to the North Carolina General Statutes, a person is guilty of obtaining property by false pretenses when a person makes a false presentation of a known fact, with the intent to deceive, and receives or attempts to receive something of value based on the false representation. N.C. Gen. Stat. § 14-100 (2009); see *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277,

286 (1980). An essential element of this offense is "that the act be done 'knowingly and designedly with intent to cheat or defraud.'" *State v. Hines*, 54 N.C. App. 529, 532-33, 284 S.E.2d 164, 167 (1981) (citations omitted). "[T]he false pretense need not come through spoken words, but instead may be by act or conduct." *State v. Parker*, 354 N.C. 268, 284, 553 S.E.2d 885, 897 (2001) (citation omitted), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). Intent to deceive is seldom proven by direct evidence, and therefore, must ordinarily be inferred from the circumstances of the case. *State v. Bennett*, 84 N.C. App. 689, 691, 353 S.E.2d 690, 692 (1987). "In determining the absence or presence of intent, the jury may consider 'the acts and conduct of the defendant and the general circumstances existing at the time of the alleged commission of the offense charged.'" *Id.* (quoting *State v. Wilson*, 14 N.C. App. 394, 399, 188 S.E.2d 667, 670 (1972)).

Here, the State presented evidence that defendant was interested in a particular hunting bow for sale at Foothills Hunting and Fishing and that the bow was discovered missing after defendant left the store. Very shortly thereafter, defendant sold the missing bow to the Whitnel pawn shop for \$200.00. Thus, the evidence shows that defendant possessed a

bow which he did not own, he presented it for sale at the pawn shop, and Mr. Holler of the pawn shop bought the bow from defendant. Mr. Holler testified that defendant signed a paper recording the sale of the bow to Whitnel. We conclude this evidence, taken in the light most favorable to the State, constitutes sufficient evidence from which the jury could determine that defendant falsely represented to Mr. Holler that he was the owner of the bow through his actions and conduct, thereby inducing Mr. Holler to purchase the bow. Therefore, the trial court did not err in denying defendant's motion to dismiss.

Next, defendant contends his sentence enhancement as an habitual felon constitutes cruel and unusual punishment. He argues that the sentence of approximately eight to ten years is grossly disproportionate to the nonviolent offense of obtaining \$200.00 by false pretenses. We note, however, that "[t]his Court and the North Carolina Supreme Court have consistently rejected Eighth Amendment challenges to habitual felon sentences." *State v. Cummings*, 174 N.C. App. 772, 776, 622 S.E.2d 183, 185-86 (2005). We do not find that defendant's sentence is "so 'grossly disproportionate' so as to result in constitutional infirmity." *State v. Hensley*, 156 N.C. App. 634,

639, 577 S.E.2d 417, 421 (2003). Defendant's argument is overruled.

No error.

Judges MCGEE and ELMORE concur.

Report per Rule 30(e).