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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-106

Filed: 1 October 2019

Durham County, No. 17CRS057265

STATE OF NORTH CAROLINA

v.

TARICIO DAQUAN MURRAY, Defendant.

Appeal by Defendant from judgment entered 20 March 2018 by Judge Stanley Allen in Durham County Superior Court. Heard in the Court of Appeals 18 September 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Oliver G. Wheeler IV, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Sterling Rozear, for Defendant.

BROOK, Judge.

I. Background

a. Factual Background

On 9 September 2017, Ana Aragon woke around 7:00 a.m. to a neighbor knocking on her door to tell her someone had broken into her shed. Her partner,

Alberto Ortiz, went to the shed to find that his lawnmower, leaf blower, chainsaw, and concrete saw were missing. Neither Ms. Aragon, Mr. Ortiz, nor the neighbor saw who had broken into the shed. On 11 September 2017, Durham County Sheriff's Office Detective Christen Reimann located Mr. Ortiz's leaf blower and lawnmower at National Jewelry and Pawn Shop on Guess Road in Durham County. Detective Reimann confirmed they belonged to Mr. Ortiz because they had "Ortiz" written on them. On 16 September 2017, Mr. Ortiz found his chainsaw and concrete saw at National Jewelry and Pawn Shop on Roxboro Road in Durham County. He recognized the tools as his because they also had his name, "Ortiz," written on them.

At trial, the parties stipulated that Taricio Murray ("Defendant") sold the saws to National Jewelry and Pawn on Roxboro Road and sold the leaf blower and lawnmower to National Jewelry and Pawn on Guess Road. The parties further stipulated that the video surveillance from each pawn shop depicted him making the transactions, and they stipulated to the authenticity of two pawn tickets memorializing the sales. In addition, the parties stipulated that Defendant signed the pawn tickets from each transaction. Each pawn ticket stated the following:

> For value received, I have this day bargained, sold, and conveyed by these presents do bargain, sell and convey unto National Jewelry and Pawn, Inc., number one, all my right, title and interest in the above described property. I do hereby certify that I am the sole and lawful owner of said property. I am at least 18 years of age and a proper person to dispose of the same.

Defendant testified that on 9 September 2017, he traveled from his home in

Raleigh to Durham to visit his mother. Before visiting his mother, he went to J&L Pawn Shop in Durham to try to sell a Roku online media player. Outside of the pawn shop, he encountered two men he did not know. The men asked him to help them sell a lawnmower and other items because they did not have any identification with them. Defendant testified that "[a]t the time[,] [he] questioned" whether the items belonged to the men, but that they assuaged his concerns by "call[ing] up a few people they did work for" to confirm that the men used lawnmowers, leaf blowers, and chainsaws in their work. Satisfied that the men owned the items they wanted Defendant to help them sell, Defendant traveled with the men in their vehicle to National Pawn on Guess Road. In exchange for his help, the men promised to purchase his Roku from him for $50, more than Defendant anticipated receiving from the pawn shop. At National Pawn on Guess Road, Defendant sold the lawnmower and leaf blower for $100, presented his state ID, and signed the pawn ticket memorializing the sale. Defendant walked out of the pawn shop with $100 in cash and handed the money to the men outside the shop.

Defendant and the two unidentified men then traveled to National Pawn on Roxboro Road, and Defendant sold the chainsaw and concrete saw for $60. Again, Defendant presented his state ID and signed the pawn ticket memorializing the sale, and again Defendant handed the men the money. Following this sale, the men took Defendant back to J&L Pawn Shop, where the three had initially met. Defendant

testified the men left without buying his Roku.

b. Procedural History

Defendant was initially charged with felonious breaking and entering in violation of N.C. Gen. Stat. § 14-54(a), larceny after breaking or entering in violation of N.C. Gen. Stat. § 14-72(b)(2), and two counts of obtaining property by false pretenses in violation of N.C. Gen. Stat. § 14-100. After GPS data collected from a tracking device Defendant wore as a condition of his house arrest for a previous conviction revealed he could not have committed breaking and entering or larceny of Mr. Ortiz's tools, the State dropped the charges of felonious breaking and entering and larceny after breaking or entering against Defendant. Defendant proceeded to trial on the charges of obtaining property by false pretenses, the Honorable Judge Stanley Allen presiding. At the close of the State's evidence, Defendant moved to dismiss the charges against him for insufficient evidence. The court denied this motion. After a jury verdict of guilty on both counts, the trial court entered judgment against Defendant and sentenced him to eight to 19 months' imprisonment on each count, to run consecutively and to be followed by 24 months of supervised probation. Defendant timely noticed appeal on 23 March 2018.

II. Analysis

Defendant raises two claims on appeal. Defendant first claims that the evidence at trial was insufficient to prove guilt beyond a reasonable doubt of obtaining

title to property by false pretenses. He also claims that, in the alternative, Defendant's counsel was ineffective for failing to make a renewed motion to dismiss for insufficiency of the evidence at the close of all the evidence and for failing to introduce GPS data that would have bolstered Defendant's claim that he was not involved in the underlying breaking and entering and larceny. We address the ineffective assistance of counsel claim first. In concluding that Defendant was not prejudiced by the alleged ineffective assistance of his trial counsel, we also resolve Defendant's claim that the evidence was insufficient to support the jury's verdict and find no error.

a. Standard of Review

A denial of a motion to dismiss for insufficient evidence is a question of law which this Court reviews *de novo*. *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007). "Under a *de novo* review, the [C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal marks and citations omitted). In evaluating whether the evidence supports a conviction, this Court considers "whether there is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Barden*, 356 N.C. 316, 351, 572 S.E.2d 108, 131 (2002).

In assessing claims of ineffective assistance of counsel, "the proper standard for judging an attorney's performance is one of reasonably effective assistance, considering all of the circumstances. The defendant must show that his counsel's representation fell below an objective standard of reasonableness as defined by professional norms." *State v. Fisher*, 318 N.C. 512, 532, 350 S.E.2d 334, 345-46 (1986) (citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065, 80 L. Ed.2d 674, 693 (1984)).

B. Ineffective Assistance of Counsel

"When raising claims of ineffective assistance of counsel, the accepted practice is to bring these claims in post-conviction proceedings, rather than on direct appeal." *State v. Dinan*, 233 N.C. App. 694, 700, 757 S.E.2d 481, 486 (2014) (internal marks and citations omitted). Our Supreme Court has held that ineffective assistance of counsel claims will be addressed on direct appeal "only when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Jones*, 176 N.C. App. 678, 688, 627 S.E.2d 265, 271 (2006) (internal marks and citations omitted). Because we conclude that Defendant's claim requires no further investigation and thus can be decided on the merits without "ancillary procedures[,]" we reach the merits here. *See id.*

In *State v. Braswell*, 312 N.C. 553, 652-63, 324 S.E.2d 241, 248 (1985), this Court adopted the standard announced in *Strickland* governing claims of ineffective assistance of counsel. To prevail on such a claim, "a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense." *State v. Allen,* 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (citing *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed.2d at 694). The United States Supreme Court in *Strickland* instructed that "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069, 80 L.E.2d. at 699. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Id.* This method "ensure[s] that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result." *Id.*, 80 L. Ed.2d at 699-70. Therefore, we first address the prejudice Defendant alleges to have suffered.

Proving prejudice requires showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S. Ct. at 2068, 80 L. Ed.2d. at 698 (internal marks and citations omitted). Where the evidence is in fact sufficient to support a

conviction, a "defendant is not prejudiced by his counsel's failure to make a motion to dismiss at the close of all the evidence." *State v. Fraley*, 202 N.C. App. 457, 467, 688 S.E.2d 778, 786 (2010). As such, we address Defendant's claim that the evidence presented at trial was insufficient to support a conviction in order to address his claim that counsel's deficient performance in failing to renew the motion to dismiss and in failing to enter certain GPS evidence prejudiced him.

i. Failure to Renew Motion to Dismiss

Under N.C. Gen. Stat. § 15A-1227, a defendant may move to dismiss a criminal charge when the evidence is insufficient to support a conviction. "The dispositive issue before this Court [is] whether there is a reasonable probability that the trial court would have granted defendant's motion to dismiss had defense counsel renewed the motion at the close of all the evidence." *State v. Tanner*, 193 N.C. App. 150, 154, 666 S.E.2d 845, 849 (2008), *rev. allowed*, *writ allowed*, 363 N.C. 662, 687 S.E.2d 294 (2009), and *rev'd on other grounds*, 364 N.C. 229, 695 S.E.2d 97 (2010). "Evidence is sufficient to support a conviction when, viewed in the light most favorable to the State and giving the State every reasonable inference therefrom, there is substantial evidence to support a jury finding of each essential element of the offense charged[.]" *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (internal marks and citations omitted).

Defendant was found guilty by a jury of obtaining property by false pretenses, defined in N.C. Gen. Stat. § 14-100(a). The North Carolina Supreme Court in *State v. Parker*, 354 N.C. 268, 284, 553 S.E.2d 885, 897 (2001) set out the elements of obtaining property by false pretenses. In order to survive a motion to dismiss for insufficiency of the evidence, the State must establish "(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." *Id.* The defendant must "act[] knowingly with the intent to cheat or defraud." *Id.* "[T]he false pretense need not come through spoken words[.]" *Id.* False representations can be false "as to existent facts, false within the knowledge of the party making them, or made recklessly without belief or any fair and just reason to believe in their truth[.]" *State v. McFarland*, 180 N.C. 726, 729, 105 S.E. 179, 180 (1920).

Reviewing the facts in the light most favorable to the State, we conclude that the State presented substantial evidence in support of each element of the crime. *See Bagley*, 183 N.C. App. at 523, 644 S.E.2d at 621. First, Defendant made a false representation when he signed the pawn ticket, asserting "I do hereby certify that I am the sole and lawful owner of said property." *See State v. Hallum*, 246 N.C. App. 658, 665, 783 S.E.2d 294, 299 (2016) (inferring defendant's deception from defendant's signature on "paperwork representing he was the lawful owner of the

materials he was selling"), *see also State v. Ruffin*, ___ N.C. App. ___, 824 S.E.2d 927, 2019 WL 1292960, at *5 (2019) (unpublished) (concluding that the defendant's signed attestation of ownership on a pawn ticket was a false representation sufficient to submit the matter to the jury). In addition, Defendant's false statement in signing the pawn tickets was calculated to and did in fact deceive the pawn shop clerks because the clerks gave Defendant value, $100 and $60, respectively, in exchange for the stolen power tools. *See Parker*, 354 N.C. at 284, 553 S.E.2d at 896, *see also Hallum*, 246 N.C. App. at 665, 783 S.E.2d at 299. That Defendant handed the entire proceeds from the sales to the two unknown men shortly after receiving them does not change the fact that the State presented sufficient evidence to prove each element of obtaining property by false pretenses.

Defendant asserts that he did not know the power tools were stolen, and that therefore the State did not present sufficient evidence that he "*knowingly* made a false representation" sufficient to prove the first element of obtaining title to property by false pretenses (emphasis added). Whether Defendant knew the items to be stolen, believed them to be stolen, or recklessly asserted that they were not stolen is immaterial. *See McFarland*, 189 N.C. at 729, 105 S.E. at 180. The State proved—and Defendant effectively stipulated to—this element with the introduction into evidence of the pawn tickets, signed by Defendant, that he was the "sole and lawful owner" of the power tools.

For these reasons, Defendant has failed to show a "reasonable probability" the trial court would have granted a renewed motion to dismiss for insufficiency of the evidence. *See State v. Fraley*, 202 N.C. App. 457, 467, 688 S.E.2d 778, 786 (2010). Defendant thus cannot show the prejudice necessary to support his ineffective assistance of counsel claim.

ii. Failure to Introduce GPS Data

Defendant further alleges that his counsel was ineffective for failing to introduce GPS data evidence which would have bolstered Defendant's claim that he was uninvolved in the underlying breaking and entering and larceny. Defendant's argument ignores the fact that regardless of whether the jury assumed Defendant to have been involved in the underlying breaking and entering and larceny, the State presented sufficient evidence for a jury to find Defendant guilty of obtaining property by false pretenses with the introduction of the pawn ticket asserting he was the "sole and lawful owner" of the items. Defendant has failed to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* Therefore, this claim is without merit.[1]

IV. Conclusion

[1] Because we conclude that Defendant has failed to establish a "reasonable probability that the result of the proceeding would have been different," *Fraley*, 202 N.C. App. at 467, but for his counsel's failure to renew the motion to dismiss and failure to introduce GPS data evidence, we necessarily conclude that Defendant has failed to establish that the evidence was insufficient to sustain his conviction.

Defendant has failed to establish that he was prejudiced by his counsel's failure to renew a motion to dismiss for insufficiency of the evidence or by counsel's failure to introduce certain evidence to bolster Defendant's defense. In the course of arriving at this conclusion, we necessarily hold that there was sufficient evidence to sustain Defendant's conviction.

NO ERROR.

Judges DILLON and TYSON concur.

Report per Rule 30(e).