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NO. COA01-1537

NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2002

STATE OF NORTH CAROLINA

v.

Randolph County
No. 99 CRS 3742

KAREN DILDINE HENDRIX

Appeal by defendant from judgment dated 21 August 2001 by Judge L. Todd Burke in Superior Court, Randolph County. Heard in the Court of Appeals 18 September 2002.

Attorney General Roy Cooper, by Assistant Attorney General Nancy E. Scott, for the State.

Richard G. Roose, for defendant-appellant.

McGEE, Judge.

Karen Dildine Hendrix (defendant) was charged on 26 March 1999 with obtaining property by false pretenses and was indicted on the same charge on 9 August 1999. Defendant and her husband, Carl Hendrix (Hendrix), were tried jointly on 21 August 2001.

The evidence at trial tended to show the following: that on 6 February 1999, defendant and Hendrix went to Southern Pride Auto Sales (Southern Pride) in Asheboro, North Carolina, so that Hendrix could look at a truck. Defendant did not enter Southern Pride's offices, but she did ride with Hendrix while he test drove a truck. Following the test drive, defendant left.

Hendrix made an offer of \$12,000.00 for the truck, which Southern Pride accepted. Hendrix did not have the money on hand to purchase the truck and Southern Pride agreed to accept a check and hold it until Hendrix could transfer sufficient funds to cover the amount of the check. Hendrix told Southern Pride that there would be no problem obtaining the money because he could obtain that amount in one day by selling a few horses. Hendrix left Southern Pride to get defendant because she had the checkbook.

Defendant testified that Hendrix told her that if she opened a checking account and wrote a check for the truck, Southern Pride would hold the check for later deposit. Defendant opened a checking account with a \$150.00 deposit and returned to Southern Pride later that afternoon. The paperwork on the truck had already been completed in Hendrix's name and defendant wrote a check for the truck in the amount of \$12,449.50. Defendant testified that she asked if she needed to write on the check, "hold this check for cash" until February 13, but was told by Southern Pride that that information was already contained in the paperwork. Hendrix then left with the truck.

A salesman at Southern Pride, Haven Marine, testified that he contacted Hendrix approximately five days following the purchase and Hendrix assured him the check would be made good. On 16 February 1999, ten days after the check was written, Southern Pride deposited it. The check was returned twice for insufficient funds. William Stanley, a co-owner of Southern Pride, also contacted Hendrix and told him to bring cash or a certified check to pay for

the truck. Hendrix promised to deliver the money to Southern Pride three different times but failed to do so. Defendant and Hendrix were charged with obtaining property by false pretenses.

Prior to trial, defendant moved to dismiss the charge against her, arguing the indictment failed to allege that defendant made any false representation. The trial court denied the motion. Defendant moved to dismiss the charges at the close of the State's evidence and again at the conclusion of all the evidence. Both motions were denied. A jury convicted defendant of obtaining property by false pretenses. The trial court sentenced defendant to a minimum of six months and a maximum of eight months in prison; the sentence was suspended and defendant was placed on supervised probation and ordered to pay \$12,449.50 in restitution. Defendant appeals.

Defendant first argues that the trial court erred in denying her motion to dismiss the indictment based on the failure of the indictment to charge an offense. Under N.C. Gen. Stat. § 15A-924(a) (5) (2001), a criminal indictment must contain

[a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

In determining the sufficiency of an indictment for obtaining property by false pretenses, our Court has stated that

there must be allegations sufficient to state a causal connection between the alleged false representation and the obtaining of the

property or money. However, no particular form of allegation is required; an allegation that the money or property was obtained "by means of a false pretense" is sufficient to allege the causal connection where the facts alleged are adequate to make clear that the delivery of the property was the result of the false representation.

State v. Childers, 80 N.C. App. 236, 241, 341 S.E.2d 760, 763, cert. denied, 317 N.C. 337, 346 S.E.2d 142 (1986) (citations omitted).

Defendant acknowledges the indictment states that she wrote a check that was returned for insufficient funds and that she took possession of the truck. However, defendant contends the indictment failed to allege that she made a false representation regarding a past or future event, thus causing the indictment to be invalid.

The elements of obtaining property by false pretenses are: "(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. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980); see N.C. Gen. Stat. § 14-100 (2001). Intent must normally be proven through inferences from circumstantial evidence rather than direct evidence. *State v. Bennett*, 84 N.C. App. 689, 691, 353 S.E.2d 690, 692 (1987).

In the present case, the indictment stated that

the defendant wrote a check to Southern Pride Auto Sales, Inc., Asheboro, North Carolina, in the amount of \$12,449.50 and took possession

of a 1994 GMC truck. The victim attempted to cash the check, and the bank denied cashing the check due to insufficient funds. The truck was never returned to the victim.

The indictment alleges sufficient facts to encompass the requisite elements of obtaining property by false pretenses. It sufficiently describes the events in question to inform defendant with certainty of the crime she allegedly committed. It also demonstrates that the instrumentality used in perpetrating the deception was a check written on insufficient funds.

Defendant attempts to distinguish *State v. Rogers*, 346 N.C. 262, 485 S.E.2d 619 (1997), in constructing her argument. In *Rogers*, the defendant wrote a check on an account that he knew was closed and presented it as payment with an implicit representation that it was covered by sufficient funds. *Id.* The defendant knew the check was worthless and intended to deceive the victim with it. The Court upheld the defendant's conviction, stating that the presentation of a worthless check is sufficient evidence to uphold a conviction for obtaining property by false pretenses. *Id.* at 264, 485 S.E.2d at 620-21.

In the case before us, defendant argues that the indictment only states that her check was returned for insufficient funds and does not allege that she issued a worthless check. The fact that the indictment did not specifically allege that a worthless check was issued by defendant is unnecessary and inconsequential because the instrumentation facilitating the deception can be determined from the alleged facts. The facts clearly demonstrate that defendant and Hendrix acquired possession of the truck based on the

false representation that the check would be covered. We find the indictment's description sufficiently supports each element of the alleged offense and provides defendant with adequate notice of the crime with which she was charged. This assignment of error is without merit.

Defendant next argues the trial court erred in denying her motion to dismiss at the close of all the evidence because the State failed to satisfy its burden of producing evidence of each element of the alleged offense. When ruling on a defendant's motion to dismiss a criminal action, "the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense. If so, the motion to dismiss is properly denied." *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

Defendant argues that she did not make a false representation or participate in negotiations for the truck and never came into possession of the truck. The State offered evidence that defendant acted in concert with Hendrix in obtaining the truck.

"A defendant acts in concert with another to commit a crime when he acts in harmony or in conjunction with another pursuant to a common criminal plan or purpose." To be convicted of a crime under the theory of acting in concert, the defendant need not do any particular act constituting some part of the crime. All that is necessary is that the defendant be "present

at the scene of the crime" and that he "act[] together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime."

State v. Lundy, 135 N.C. App. 13, 18, 519 S.E.2d 73, 78 (1999) (quoting *State v. Moore*, 87 N.C. App. 156, 159, 360 S.E.2d 293, 295 (1987)), *disc. review denied*, 351 N.C. 365, 542 S.E.2d 651 (2000). In instructing the jury on acting in concert, the trial court stated, "[i]f two or more persons are joined in a purpose to commit the offense of Obtaining Property by False Pretenses, each of them if actually[,] not constructively[,] present[] is guilty of that crime if the other commits the crime."

Defendant accompanied Hendrix when he test drove the vehicle, defendant wrote a check to purchase the vehicle, and defendant accompanied Hendrix when he picked up the vehicle. Defendant also took no action that would negate her involvement in the continued false representation. See *Bennett*, 84 N.C. App. at 691, 353 S.E.2d at 692 (stating that the jury may consider the acts and conduct of defendant and the overall circumstances). The evidence sufficiently supports a conclusion that defendant and Hendrix acted in concert in obtaining property by false pretenses. While defendant, Hendrix and Southern Pride knew there were insufficient funds in the account when the check was presented, defendant and Hendrix represented that the check would be made good within a few days. Southern Pride waited ten days after the check was written to attempt to deposit it and the check was returned twice for insufficient funds. Additionally, defendant and Hendrix were contacted repeatedly, with Hendrix giving assurances that the check

would be made good. However, funds were never transferred into the bank account and Southern Pride never received payment. This evidence is sufficient to permit a reasonable mind to conclude that defendant obtained the truck but never intended to pay for it.

Defendant further attempts to distinguish *Rogers* from the facts in this case. *Rogers*, 346 N.C. at 262, 485 S.E.2d at 619. In the case before us, Hendrix repeatedly misrepresented that he would cover the check written by defendant to Southern Pride by defendant but he never paid Southern Pride. The evidence presented at trial is sufficient to permit a reasonable juror to conclude that the parties never intended to pay Southern Pride, despite their assurances to the contrary. While defendant may not have made a false representation as to the existence of money in the checking account, as in *Rogers*, the evidence supports a conclusion that when defendant and Hendrix tendered the check for the truck, they falsely represented that the check would later be covered. This assignment of error is without merit.

Defendant lastly argues the trial court erred in denying her requested jury instruction that "non-fulfillment of contract obligations standing alone shall not establish the essential elements of attempt to defraud." See N.C.G.S. § 14-100(b). A requested jury instruction must be given, at least in substance, if it is legally correct and supported by the evidence. *Lundy*, 135 N.C. App. at 23, 519 S.E.2d at 81. "On appeal, defendant must show that substantial evidence supported the omitted instruction and that the instruction was correct as a matter of law." *State v.*

Farmer, 138 N.C. App. 127, 133, 530 S.E.2d 584, 588, *disc. review denied*, 352 N.C. 358, 544 S.E.2d 550 (2000).

In the case before us, there is no evidence of a contract obligation that remains unfulfilled. The record does not demonstrate that the parties entered into an installment plan, financing plan, leasing contract, or payment plan other than the check written by defendant. Tender of the check completed the transaction and terminated the obligations under the contract, but the check was never covered with sufficient funds as represented by Hendrix. Additionally, Hendrix continued to make false representations concerning delivery of the money to Southern Pride and made no effort to fulfill his representations or further negotiate with Southern Pride. Defendant failed to present substantial evidence supporting this jury instruction or to demonstrate that it was correct as a matter of law. Accordingly, the evidence did not support the requested jury instruction and was properly denied. This assignment of error is without merit.

No error.

Judges WALKER and HUNTER concur.

Report per Rule 30(e).