An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA01-1599

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

STATE OF NORTH CAROLINA

v. Cumberland County
No. 99 CrS 73157

LYNWOOD RAY MESSER

Appeal by defendant from judgment entered 29 March 2001 by Judge D. Jack Hooks, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 28 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General Michelle B. McPherson, for the State.

Margaret Creasy Ciardella for defendant-appellant.

EAGLES, Chief Judge.

Defendant, Lynwood Ray Messer, appeals from judgment entered in Cumberland County Superior Court upon a jury verdict convicting him of one count of obtaining property by false pretenses.

The State's evidence tended to establish the following. During July of 1999, Margaret Elizabeth Hooks ("Hooks") told her employer, James Jethwa ("Jethwa"), that she wanted to buy a vehicle for her son. Jethwa told Hooks about someone he knew who could give her a good deal on a repossessed vehicle and Jethwa subsequently gave Hooks' phone number to defendant.

On 2 August 1999, defendant contacted Hooks by phone and identified himself as the person that Jethwa had told her about. Defendant said that he was in the business of both selling and repossessing cars for "the bank" and that he had the option to bid on the cars he repossessed. Hooks told defendant that she was looking for a "fairly new" Ford or Chevrolet pickup truck with an eight-cylinder engine. Defendant offered to sell her a recently repossessed "1997 XLT Ford" that was "fully loaded" with a six cylinder engine. Hooks declined defendant's offer, stating that she needed a truck with an eight-cylinder engine. Defendant called Hooks back approximately thirty minutes later and said he had mistakenly described the truck as having only a six cylinder engine. Defendant said he had checked the truck again and discovered that it was indeed equipped with an eight cylinder engine. Defendant again offered to sell the truck to Hooks and quoted her a purchase price of $8,410. Defendant also said he was in the process of taking the truck to "BB&T" and informed Hooks that if she wanted to buy the truck, she would have to send him $4,000 before two o'clock that afternoon. Defendant explained that "in order for him to get that truck," he had to deliver the money to the bank by 2:00 p.m., otherwise, "someone else could bid on that truck and [Hooks] could lose the truck."

Hooks asked defendant to see the truck. Defendant told Hooks the truck was locked up at the bank's storage lot and the bank would not allow her to enter their secure lot to see the truck. Defendant repeatedly assured Hooks that the truck had no mechanical defects

and further stated that if Hooks was not completely satisfied with the truck, he would give her a full refund. Hooks was reluctant to agree without first seeing the truck. However, following a third conversation with defendant and defendant's repeated assurances, Hooks agreed to buy the truck "sight unseen." Defendant then instructed Hooks to send him the money via "Western Union" and Hooks complied.

The following day, Hooks called and spoke to defendant over the phone. Defendant acknowledged receipt of the money and told Hooks that the bank would hold the truck for 12 to 14 days, at which time she would be required to "pay the balance" of the purchase price and "the truck would be cleared."

On 11 August 1999, defendant called Hooks and requested payment of the balance of the purchase price. Once again, defendant told Hooks that he needed the money before 2:00 p.m. and instructed Hooks to send him the money via "Western Union." Defendant promised to deliver the truck to Hooks in "two days." Hooks complied and transferred $4,410 to defendant. Defendant, however, never delivered the truck.

On 13 August 1999, Hooks called defendant and inquired about the truck. Defendant told Hooks that the truck's electrical system was in need of some repairs and that he had taken the truck to a Ford dealership in Raleigh where the repairs would be covered under the truck's warranty. Defendant asked Hooks to wait "a couple of days" and assured her that he would deliver the truck as soon as the repairs were complete. Several days passed with Hooks neither

hearing from nor seeing defendant, so Hooks contacted defendant again and inquired about the truck. This time defendant said that a part had to be ordered for the truck and that it had not yet arrived. Defendant told Hooks that the truck would be ready in about a week and asked Hooks to be patient. Defendant assured Hooks that "the truck would be there" after the repairs were complete. At the end of that week, when Hooks had neither heard from defendant nor seen the truck, Hooks called defendant again. During this conversation, defendant told Hooks that the truck had required additional repairs and asked for yet another week. When Hooks called back at the end of that week, defendant gave another reason for the delay. This prompted yet another call by Hooks and yet another excuse by defendant, along with defendant's assurance that the truck would be delivered when the repairs were complete. Hooks continued calling defendant for the next three to four months; first on a weekly basis and later on a daily basis. Hooks also spoke to defendant in person at least four times. Each time, defendant maintained that the truck was undergoing repairs in Raleigh and would be delivered upon completion of the repairs. Ultimately, defendant never produced the "1997 XLT Ford," nor did defendant ever tell Hooks that the truck had been redeemed by the debtor.

On 19 November 1999, Hooks met with defendant at his place of business and demanded that he refund her money. Defendant offered to give Hooks a "1997 F150 XL" that was on defendant's lot, in partial satisfaction of the money he owed her. Hooks agreed on the condition that defendant would provide her with the title to this

truck on 20 November 1999. Hooks drove the truck home but defendant never delivered the title. Hooks contacted defendant several times after 20 November 1999 to inquire into why she had not received the title. Much like before, defendant gave Hooks one reason after another for his failure to deliver the title, along with the assurance that she would have the title soon. However, defendant never produced the title and the truck was repossessed while Hooks was at work. Defendant never contacted Hooks again and Hooks never received any part of the money she paid for the original truck. The State's evidence also included the testimony of Michael Dean Renfrow, who testified over defendant's objection, that defendant approached him on or about 20 July 1998, representing himself as one of the owners of a car lot called "Tarheel Traders." Defendant, who knew that Renfrow operated tow trucks, offered to sell Renfrow a "94 S super duty" tow truck for $5,812. Defendant said that he dealt very closely with a Greensboro lending institution in the course of his business. As a result, defendant knew that this lending institution had recently repossessed the truck, which defendant said he could acquire for Renfrow by paying only the amount that was owed on the truck. Defendant quoted Renfrow a purchase price of $5,812. Renfrow accepted defendant's offer and gave defendant $5,812 to acquire the truck, which was to be delivered five days later.

Renfrow further testified that defendant failed to deliver the truck as promised. After the fifth day, Renfrow went to defendant's car lot and inquired about the truck. Defendant told Renfrow that delivery had been delayed because there was a problem with the

truck’s fuel injector. Defendant said he had taken the truck to the “shop” to have the fuel injector repaired and that the repairs would be complete in a “couple” of days. One week later, defendant still had not delivered the truck, so Renfrow went back to see defendant. This time defendant said there was a problem with the truck’s glow plugs and that additional repairs were needed. Defendant assured Renfrow that this would only delay delivery for a few more days. The next time Renfrow inquired about the truck, defendant said he was unable to deliver the truck because the lending institution was being audited. Renfrow spoke to defendant almost daily for the next month. Each time Renfrow inquired about the truck, defendant made one excuse after another until defendant offered to refund Renfrow’s money. Defendant then gave Renfrow a personal check which was later dishonored by the bank. Renfrow stated that as of the date of defendant’s trial, he had not received either the truck or any part of his money.

At the close of the State’s evidence, the trial court denied defendant’s motion to dismiss for insufficiency of the evidence. Defendant presented no evidence and was convicted of obtaining property by false pretenses. Defendant appeals.

Defendant first argues that the trial court erred when it allowed the testimony of Michael Dean Renfrow pursuant to Rule 404(b) as evidence of defendant’s intent, common plan or scheme, and the absence of mistake. Specifically, defendant contends that the trial court improperly concluded that the incidents were

sufficiently similar and not too remote in time to be admissible under Rule 404(b). We disagree.

Rule 404(b) of the North Carolina Rules of Evidence provides in pertinent part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404 (2001).

Determining the admissibility of evidence under N.C.R. Evid. 404(b) involves a three step analysis: First, the trial court must determine whether the evidence is offered for a proper purpose under the rule. *State v. Bynum*, 111 N.C. App. 845, 848, 433 S.E.2d 778, 780 (1993), *disc. review denied*, 335 N.C. 239, 439 S.E.2d 153 (1993). Next, the trial court must determine whether the evidence is relevant, *id.*, meaning that the evidence has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.R. Evid. 401. Finally, the trial court must determine "whether the incidents are sufficiently similar and not too remote in time so as to be more probative than prejudicial under . . . Rule 403." *State v. Schultz*, 88 N.C. App. 197, 202, 362 S.E.2d 853, 857 (1987), *aff'd per curiam*, 322 N.C. 467, 368 S.E.2d 386 (1988). Whether to exclude evidence under Rule 403 is a matter within the sound discretion of the trial judge and "abuse of that discretion will be found on appeal only if the ruling

is 'manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision.'" *State v. White*, 349 N.C. 535, 552, 508 S.E.2d 253, 264-65 (1998) (quoting *State v. Syriani*, 333 N.C. 350, 379, 428 S.E.2d 118, 133, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993)), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999).

Here, following *voir dire*, the trial court made detailed findings of fact which support its conclusion that the evidence was admissible under Rule 404(b). Specifically, the trial court found that there were "striking similarities between the two alleged offenses; all of which would be relevant to show intent, which is a necessary element in this case, a common scheme or plan, or the absence of mistake." The trial court further found that "while 13 months is a lengthy period of time, . . . the striking similarities between the case at trial and the testimony . . . outweigh[ed] the 13 month span." Finally, the trial court concluded that "the probative value particularly as to show the -- necessary intent, common scheme and absence of mistake would outweigh any prejudicial effect."

We find no merit in defendant's argument that the incidents were too remote in time and lacked sufficient similarity to be relevant.

> Under Rule 404(b) a prior act or crime is 'similar' if there are 'some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both.' However, it is not necessary that the similarities between the two situations 'rise to the level of the unique and bizarre.' Rather, the similarities simply must tend to support a *reasonable*

> inference that the same person committed both the earlier and later acts.

State v. Stager, 329 N.C. 278, 304, 406 S.E.2d 876, 890-91 (1991)(citations omitted). Moreover, "remoteness in time generally goes to the weight of the evidence rather than to its admissibility." *State v. Wilds,* 133 N.C. App. 195, 202, 515 S.E.2d 466, 473 (1999). While "[r]emoteness in time may be significant when the evidence of the prior crime is introduced to show that both crimes arose out of a common scheme or plan . . . remoteness is less significant when [as here] the prior conduct is used to show intent, motive, knowledge, or lack of accident." *Id.* (citation omitted). Since the record before us clearly shows that the trial court's decision was based on both the proper legal analysis and a reasoned evaluation of the facts and circumstances of this case, we cannot say the trial court abused its discretion by admitting the evidence pursuant to Rule 404(b). Accordingly, this assignment of error is overruled.

Defendant next argues that the trial court improperly denied his motion to dismiss for insufficiency of the evidence. Specifically, defendant contends that the State failed to produce competent evidence to support an inference that defendant had the requisite *mens rea* to sustain his conviction. We disagree.

"It is well established that a motion to dismiss should be denied if there is substantial evidence of each essential element of the crime and defendant is the perpetrator." *State v. Duncan*, 136 N.C. App. 515, 518, 524 S.E.2d 808, 810 (2000). "The test of the sufficiency of the evidence is whether a reasonable inference of

defendant's guilt can be drawn." *State v. Barfield*, 127 N.C. App. 399, 401, 489 S.E.2d 905, 907 (1997). When ruling on a motion to dismiss, "[t]he trial judge must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from the evidence." *Duncan*, 136 N.C. App. at 518, 524 S.E.2d at 811. "[C]ontradictions and discrepancies are for the jury to resolve and do not warrant dismissal." *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

The essential elements of the crime 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). We note that defendant does not challenge the sufficiency of the evidence to establish elements one, three and four. Defendant's argument is confined to the issue of whether the evidence was sufficient to support a reasonable inference that he "had the intent to defraud." Therefore, our review is limited to the determination of that issue. N.C. R. App. P. 28(a).

Rule 404(b) evidence is often "'critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct.'" *Stager*, 329 N.C. at 305, 406 S.E.2d at 891 (citation

omitted). Inferences are based on the proposition that "the more often a defendant performs a certain act, the less likely it is that the defendant acted innocently. The recurrence or repetition of the act increases the likelihood of a *mens rea* or mind at fault." *Id.* (citation omitted).

In *State v. Barfield*, 127 N.C. App. 399, 489 S.E.2d 905 (1997), this Court held that in the context of obtaining property by false pretenses, reasonable inferences could be drawn from the testimony of "other witnesses who contracted with defendant and obtained the same results." *Id.* at 402, 489 S.E.2d at 908.

In *Barfield*, the defendant promised to move a mobile home for Jones and was paid $8,500 to do the work. Despite defendant's repeated assurances that he would do the work, the work was never commenced and defendant retained Jones' money. Other witnesses testified that defendant also promised to move their houses. In each instance, defendant failed to do the work but kept the money that he had been paid in advance. *Id.* at 400, 489 S.E.2d at 907. This Court held that defendant's motion to dismiss the charge of obtaining property by false pretenses was properly denied because "a reasonable inference [that] defendant falsely represented he would move the house . . . [could be drawn] from the testimony of [the] two other witnesses who contracted with defendant and obtained the same results." *Id.* at 402, 489 S.E.2d at 908. Moreover, where the State's evidence supports a reasonable inference that the defendant knew that his representations were false and were made in order to induce the victim to confer some value on the defendant,

the evidence is sufficient to show that the defendant had the requisite intent for purposes of withstanding a motion to dismiss. *State v. Childers*, 80 N.C. App. 236, 242, 341 S.E.2d 760, 764 (1986), *disc. review denied*, 317 N.C. 337, 346 S.E.2d 142 (1986).

Here, Renfrow testified that he purchased a vehicle from defendant under circumstances that were "strikingly similar" to those here. In both instances, defendant repeatedly assured the buyers over extended periods of time that he would deliver the vehicle once repairs were complete but never delivered the vehicle and never returned the money to the would be purchaser. This recurrence or repetition supports a reasonable inference that defendant acted with the intent to deceive. In addition, Hooks testified that defendant never told her that the original truck had been redeemed by the debtor. Viewed in the light most favorable to the State, this gives rise to an inference that defendant knew that his representations were false and were made for the purpose of inducing Hooks to pay money for the truck he knew he could not deliver. Accordingly, we conclude that the evidence supports a reasonable inference that defendant possessed the requisite state of mind, *i.e.*, the intent to deceive Hooks. Accordingly, the trial court properly denied defendant's motion to dismiss.

For the foregoing reasons, we find that defendant received a fair trial, free from prejudicial error.

No error.

Judges TYSON and THOMAS concur.

Report per Rule 30(e).