

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA05-1085

NORTH CAROLINA COURT OF APPEALS

Filed: 16 May 2006

STATE OF NORTH CAROLINA

v.

Richmond County  
No. 04 CRS 53023

LOWELL DEAN JOHNSON  
Defendant

Appeal by defendant from a judgment dated 28 April 2005 by Judge Michael E. Beale in Richmond County Superior Court. Heard in the Court of Appeals 10 April 2006.

*Attorney General Roy Cooper, by Assistant Attorney General J. Douglas Hill, for the State.*

*Sue Genrich Berry for defendant.*

BRYANT, Judge.

Lowell Dean Johnson (defendant) appeals from a judgment dated 28 April 2005, entered consistent with a jury verdict finding him guilty of obtaining property by false pretenses. We affirm the judgment of the trial court.

*Facts*

On 15 April 1997 John Edward Tannahill purchased a mobile home and placed it on a lot located at 100 Cactus Ridge Road in Hoffman, North Carolina. In the Spring of 2004 Tannahill fell behind on the loan payments due on the mobile home. On 26 May 2004, Vanderbilt Mortgage and Finance, Inc. (VMF) sent a notice of default to

Tannahill informing him that if he did not pay his past due payments VMF may repossess the mobile home. When no attempt was made by Tannahill to correct his default on the loan, VMF sent a notice of private sale to Tannahill on 15 June 2004, informing him the mobile home would be sold on 25 June 2004.

In May or June of 2004, Christopher and Jocelyn Smith contacted defendant regarding an advertisement in the newspaper concerning a mobile home for rent. Defendant subsequently showed the Smiths the mobile home located at 100 Cactus Ridge Road which was not the mobile home for which defendant had originally placed the advertisement. Roger Pociask, Re-marketing Field Manager for VMF, testified that neither he nor his company gave defendant the right to rent the mobile home located at 100 Cactus Ridge Road.

Upon viewing the mobile home, the Smiths noticed a "For Sale" sign containing an account number in the window of the mobile home. When the Smiths asked defendant about the sign, he told them "It was for sale, but I bought it," removed the sign from the window and threw it away. The Smiths moved into the mobile home on 1 July 2004, paying defendant a security deposit of \$100.00 and the first month's rent of \$350.00. Mr. Smith testified he subsequently paid another \$150.00 in cash toward the rent due in August. A few weeks after the Smiths moved in, deputies from the Richmond County Sheriff's Department attempted to serve eviction notices upon the prior owners. The Smiths contacted defendant regarding the eviction notices, and he told them not to worry, he was in the process of buying the mobile home from the bank himself.

In July 2004, Charles Smith Mobile Homes (Charles Smith) was in the process of purchasing the mobile home located at 100 Cactus Ridge Road. Scott Oliver, an employee of Charles Smith was sent to secure the property on Cactus Road, take pictures of it, and to generally determine its condition. When he arrived he found the Smiths living in the trailer and asked them why they were there. Oliver informed the Smiths the trailer was being purchased by Charles Smith from VMF; and that defendant did not own the trailer. Oliver gave the Smiths the telephone number for VMF so they could verify that the trailer was being sold by VMF and he was there to begin the process. Oliver testified that Charles Smith eventually purchased the trailer from the bank.

The Smiths moved out of the mobile home on 30 August 2004. In early August 2004 the Smiths contacted Detective Larry Bowden of the Richmond County Sheriff's Department complaining of their dealings with defendant. After investigating the Smith's complaints, Detective Bowden verified that defendant was not the owner of the mobile home and drew up an arrest warrant for obtaining property by false pretenses. Defendant was arrested under this warrant on 10 September 2004.

#### *Procedural History*

On 4 October 2004, defendant was indicted for obtaining property by false pretenses. Defendant was tried before a jury at the 25 April 2005 session of Superior Court for Richmond County, the Honorable Michael E. Beale, presiding. On 28 April 2005, the jury returned its verdict finding defendant guilty of obtaining

property by false pretenses. The trial court subsequently imposed a sentence of eight to ten months imprisonment and ordered defendant to pay court costs, restitution and attorney's fees totaling \$3,666.27. The active sentence was suspended and defendant was placed on supervised probation for thirty-six months with several special conditions including an active term of imprisonment of sixty days. Defendant appeals.

---

Defendant raises the issues of whether the trial court erred in: (I) denying defendant's motion to set aside the jury verdict due to a variance between the indictment and the evidence presented by the State; (II) denying defendant's motion to dismiss for insufficient evidence to support a charge of obtaining property by false pretenses; (III) failing to instruct the jury as requested by defendant; and (IV) instructing the jury in a manner resulting in a verdict that is ambiguous as to its unanimity. For the reasons below, we find no error in the trial or the judgment of the trial court.

I

Defendant argues the trial court erred in denying his motion to set aside the jury verdict due to a variance between the indictment and the evidence presented by the State. "In order to prevail on such a motion, the defendant must show a fatal variance between the offense charged and the proof as to 'the gist of the offense.' This means that the defendant must show a variance regarding an essential element of the offense." *State v. Pickens*,

346 N.C. 628, 646, 488 S.E.2d 162, 172 (1997) (citations omitted). This Court has further held that "[a]llegations beyond the essential elements of the offense are irrelevant and may be treated as surplusage and disregarded when testing the sufficiency of the indictment. To require dismissal any variance must be material and substantial and involve an essential element." *State v. Pelham*, 164 N.C. App. 70, 79, 595 S.E.2d 197, 203 (citations omitted), *appeal dismissed, disc. review denied*, 359 N.C. 195, 608 S.E.2d 63 (2004).

Here, the indictment charged defendant with obtaining property by false pretenses and stated that on or about 1 July 2004, defendant:

willfully and feloniously did knowingly and designedly with the intent to cheat and defraud obtain and attempt to obtain U.S. Currency from Christopher and Jocelyn Smith by means of a false pretense which was calculated to deceive and did deceive.

The false pretense consisted of the following: the defendant rented a Mobile Home to the victims representing it to be his property, when in truth and in fact, at the time the defendant knew the mobile home did not belong to him and that the home had been repossessed by and owned by the Bank.

Defendant argues in the instant case, the "gist of the offense" not proven by the State is that defendant rented the home knowing that it did not belong to him *and that it belonged to the bank*. Defendant's argument is misplaced.

The crime of obtaining property by false pretenses is committed:

[i]f any person shall knowingly and designedly by means of any kind of false pretense whatsoever, whether the false pretense is of a past or subsisting fact or of a future fulfillment or event, obtain or attempt to obtain from any person within this State any money, goods, property, services, chose in action, or other thing of value with intent to cheat or defraud any person of such money, goods, property, services, chose in action or other thing of value[.]

N.C. Gen. Stat. § 14-100(a) (2005). To convict a defendant of obtaining property by false pretenses, the State must prove beyond a reasonable doubt: "(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)). At trial the State produced evidence showing that defendant offered to rent the mobile home to the Smiths, telling them at the time that he owned the mobile home. Based upon this representation, the Smiths agreed to rent the mobile home from defendant with a monthly payment of \$350.00 and a \$100.00 security deposit and, on 1 July 2004, paid \$450.00 to defendant.

The incontrovertible evidence at trial established that defendant was not the owner of the mobile home and did not have the authority to rent the mobile home to the Smiths. Whether or not the "Bank" owned the mobile home is not material to defendant's false representation that he owned the mobile home. The allegation

that the "Bank" owned the mobile home was not necessary to the charge of obtaining property by false pretenses and is therefore mere surplusage in the indictment. This assignment of error is overruled.

II

Defendant next argues the trial court erred in denying his motion to dismiss for insufficient evidence to support a charge of obtaining property by false pretenses. Defendant contends the State failed to prove that defendant knew the "Bank" owned the mobile home and that the evidence at trial was insufficient to show that he knew that the mobile home did not belong to him at the time he rented it to the Smiths.

In addressing a criminal defendant's motion to dismiss for insufficiency of the evidence, the trial court must determine whether there is substantial evidence: (1) of each essential element of the offense charged; and (2) of defendant's being the perpetrator of the offense. Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion. The court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal, but are for the jury to resolve.

*State v. Yelton*, \_\_ N.C. App. \_\_, \_\_, 623 S.E.2d 594, 599 (2006) (citing *State v. Scott*, 356 N.C. 591, 595-97, 573 S.E.2d 866, 868-69 (2002)). As discussed in Issue I, *supra*, the State presented substantial evidence of each of the elements of obtaining property by false pretenses. Evidence at trial showed that defendant first stated he owned the mobile home but then later stated that he was

in the process of purchasing the mobile home when the Smiths confronted him regarding the notices of eviction brought by the Richmond County Sheriff's Department. The evidence at trial was sufficient to show that he knew that the mobile home did not belong to him at the time he rented it to the Smiths. This assignment of error is overruled.

*III*

Defendant also argues the trial court erred in failing to instruct the jury as he requested. Defendant contends the trial court should have given the jury an instruction which was specific to the misrepresentation alleged in the indictment; instead, the trial court gave the following instruction to the jury:

The defendant has been charged with the offense of obtaining property by false pretense. For you to find the defendant guilty of this offense the State must prove five things beyond a reasonable doubt.

First, the defendant made a representation to another. Second, that this representation was false. Third, that this representation was calculated and intended to deceive. Fourth, that the victim was in fact deceived by this representation. And, Fifth, that the defendant thereby obtained property from the victim.

So I charge if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant made a representation, and that this representation was false, that this representation was calculated and intended to deceive, that the victim was in fact deceived by it, and that the defendant thereby obtained property from the victim, it would be your duty to return a verdict of guilty.

"A jury instruction that is not specific to the misrepresentation in the indictment is acceptable so long as the



court finds 'no fatal variance between the indictment, the proof presented at trial, and the instructions to the jury.'" *State v. Ledwell*, 171 N.C. App. 314, 320, 614 S.E.2d 562, 566 (2005) (quoting *State v. Clemmons*, 111 N.C. App. 569, 578, 433 S.E.2d 748, 753 (1993)). As any ownership of the mobile home by the "Bank" and knowledge thereof by defendant has been held as surplusage in the indictment, see Issues I and II, *supra*, an instruction on who owned the mobile home was not necessary to the charging offense and a request for such instruction was properly disregarded by the trial court. This assignment of error is overruled.

#### IV

Defendant lastly argues the jury instructions as submitted by the trial court violate his right to a unanimous verdict. Defendant argues the jury instructions did not set out a date certain, a certain amount of U.S. currency or a certain misrepresentation calculated and intended to deceive and thus, it is impossible to discern whether all twelve jurors found the defendant guilty of the same misrepresentation on the same date resulting in the same harm.

Where, however, a defendant is charged under a statute that criminalizes a "single wrong" which "may be proved by evidence of the commission of any one of a number of acts" then there is no risk of a nonunanimous verdict. *State v. Petty*, 132 N.C. App. 453, 460, 512 S.E.2d 428, 433 (1999). This Court has held that N.C. Gen. Stat. § 14-100 establishes a single wrong and does not "enumerate any specific activities which are separately

punishable." *State v. Almond*, 112 N.C. App. 137, 145, 435 S.E.2d 91, 96 (1993).

In the instant case, the only representation before the jury was whether defendant owned the mobile home and thus had the authority to lease it to the Smiths. The multiple statements made by defendant supporting this misrepresentation and the separate instances of defendant taking money through this representation are merely alternative ways to establish a single offense of obtaining property by false pretenses. *See State v. Lawrence*, \_\_N.C. \_\_, \_\_, \_\_ S.E.2d \_\_, \_\_ (Apr. 7, 2006) (No. 293A05) (Affirming convictions for three counts of taking indecent liberties with a minor where "one juror might have found some incidents of misconduct and another juror might have found different incidents of misconduct, the jury as a whole found that improper sexual conduct occurred.") Therefore, defendant's challenge to the jury instruction is without merit. We are satisfied that the jury was unanimous in its verdict as to each element of obtaining property by false pretenses. This assignment of error is overruled.

No error.

Chief Judge MARTIN and Judge HUDSON concur.

Report per Rule 30(e).