NO. COA05-1575

NORTH CAROLINA COURT OF APPEALS

Filed: 19 September 2006

STATE OF NORTH CAROLINA

v. Haywood County
No. 04 CRS 54194

DONNIE RAY THOMPSON

Appeal by defendant from judgment entered 12 August 2005 by Judge Charles P. Ginn in Haywood County Superior Court. Heard in the Court of Appeals 24 August 2006.

Attorney General Roy Cooper, by Assistant Attorney General Laura J. Gendy, for the State.

Michael E. Casterline for defendant-appellant.

STEELMAN, Judge.

Defendant appeals from his conviction of obtaining property by false pretenses. For the reasons discussed herein, we find no error.

The State's evidence tended to show that on 3 November 2004, Joe Dean Arwine (Arwine) entered an Ingles store in Hazelwood, North Carolina, to purchase groceries. Arwine accidentally left his wallet, containing $836.00 in cash, at the checkout counter and returned to his home. Defendant, Donnie Ray Thompson, was approximately two customers behind Arwine in the checkout line.

Andrea Kaufman (Kaufman), the Ingles cashier who had previously assisted Arwine and defendant, found the wallet and mistakenly believed it belonged to defendant. Kaufman approached defendant in the parking lot of Ingles where he was loading groceries into his car. Kaufman asked if the wallet belonged to defendant. Defendant reached into his back pocket, thought for a second, and then said: "Oh, yeah, I did, thank you." (R p. 18). Kaufman was unable to see defendant's back pocket and handed the wallet to him.

When Arwine arrived home, he realized he had left his wallet at the Ingles checkout counter and returned to the store to inquire about it. Kaufman told Arwine she had given the wallet to another man earlier in the evening.

A couple of days later, Lauren Call (Call) found Arwine's wallet on the floor of the Timeout Market. The wallet contained credit cards, but no cash or driver's license. The next day, Call returned the wallet to Arwine as he had found it.

Defendant presented no evidence at trial. The jury found defendant guilty of obtaining property by false pretenses, and the court sentenced defendant within the presumptive range to eight to ten months imprisonment. The judge suspended the sentence and placed defendant on supervised probation for thirty-six months and ordered him to pay restitution, court costs, a fine and attorney's fees. Defendant appeals.

I. Indictment

Defendant first contends the trial court lacked jurisdiction because the indictment did not contain all of the essential elements of the offense and did not specify the amount of money obtained. We disagree.

The purpose of an indictment is "to give the defendant notice of the charge against [him] . . . [and] to enable the court to know what judgment to pronounce in case of conviction." *State v. King*, ___ N.C. App. ___, ___, 630 S.E.2d 719, 723 (2006) (quoting *State v. Burton*, 243 N.C. 277, 278, 90 S.E.2d 390, 391 (1955)). An indictment must contain, "[a] plain and concise factual statement in each count which . . . 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." N.C. Gen. Stat. § 15A-924(a)(5) (2005). The essential 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 also State v. Parker*, 354 N.C. 268, 553 S.E.2d 885 (2001).

The indictment returned by the Haywood County Grand Jury in this case reads as follows:

> [The defendant] unlawfully, willfully and feloniously did knowingly and designedly with the intent to cheat and defraud obtain and attempt to obtain money from Joe Dean Arwine,

> II by means of a false pretense which was calculated to deceive and did deceive. The false pretense consisted of the following: this property was obtained by means of the defendant accepting a wallet that had been left in Ingles, knowing that the wallet did not belong to him.

Defendant first argues the element of false representation is missing from the indictment because accepting a wallet knowing that it does not belong to defendant does not constitute a false representation. For the offense of obtaining property by false pretenses, a "representation of a false pretense 'need not come through spoken words, but instead may be by act or conduct.'" *State v. Ledwell*, 171 N.C. App. 314, 319, 614 S.E.2d 562, 566 (2005) (quoting *State v. Parker*, 354 N.C. 268, 284, 553 S.E.2d 885, 897 (2001)). The indictment in question sufficiently alleged a misrepresentation to put defendant on notice of the crime of obtaining property by false pretenses.

Defendant also argues the indictment was invalid because it does not allege the specific amount of money obtained. With regard to the crime of obtaining property by false pretenses, "'[i]t is the general rule that the thing obtained . . . must be described with reasonable certainty, and by the name or term usually employed to describe it.'" *State v. Walston*, 140 N.C. App. 327, 334, 536 S.E.2d 630, 635 (2000) (quoting *State v. Gibson*, 169 N.C. 318, 320, 85 S.E. 7, 8 (1915)). "North Carolina General Statute § 14-100 states that 'any money' obtained by false pretenses constitutes a violation of the statute and does not specify that the indictment

include the specific amount of money." *Ledwell,* 171 N.C. App. at 318, 614 S.E.2d at 565 (quoting N.C. Gen. Stat. § 14-100 (2003)).

In *Ledwell*, the indictment for obtaining property by false pretenses alleged the defendant attempted to obtain "United States currency" by "represent[ing] to an employee of Wal-Mart that he was entitled to a refund for a watch band, when in truth and in fact, the defendant knew that he had unlawfully taken the watch band and was not entitled to a refund." *Id.* This Court upheld the defendant's conviction and stated that an indictment for obtaining property by false pretenses, which mentioned the specific item the defendant used to obtain the money, was sufficient to provide the defendant with notice of the crime for which he was charged. *Id.*

In the case at bar, the term "money" combined with the reference to the wallet left at Ingles in the indictment described the property obtained with reasonable certainty. This combination put the defendant on sufficient notice that he was being charged with the crime of obtaining property by false pretenses. Thus, we hold the indictment sufficiently alleged the essential elements of the crime charged. This argument is without merit.

II. Motion to Dismiss for Insufficient Evidence

Defendant next contends the trial court erred in failing to dismiss the case at the close of evidence because there was no evidence that defendant deceived the victim. We disagree.

At the close of evidence, defendant moved to dismiss the case for insufficiency of evidence pursuant to N.C. Gen. Stat. § 15A-1227(a)(2) (2005). The trial court denied this motion. "In ruling

on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, which is entitled to every reasonable inference which can be drawn from that evidence." *State v. Dick*, 126 N.C. App. 312, 317, 485 S.E.2d 88, 91 (1997). "If there is substantial evidence--whether direct, circumstantial, or both--to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988).

Defendant contends the motion to dismiss should have been granted because the State did not produce sufficient evidence of a false representation. Specifically, defendant argues the State did not offer any evidence of a false representation, and the State did not prove any causal connection between a false representation and the obtaining of property.

Upon review of the evidence presented at trial, we hold the State produced substantial evidence that defendant made a false representation about his entitlement to the wallet and that he obtained the wallet and $836.00 through this representation. Kaufman's testimony shows that she approached defendant in the parking lot of Ingles. She asked, "Sir, did you lose your wallet or forget your wallet?" Defendant responded by feeling in his back pocket and answering, "Oh, yeah, I did, thank you." Based on this testimony, a reasonable jury could find that defendant falsely represented that the wallet was his, that Kaufman was deceived by

this representation, and therefore, infer that this deceit caused her to give the wallet to the defendant.

Defendant also asserts that, although he may have deceived Kaufman, the State presented no evidence that he deceived the actual victim, Arwine. However, a closer look at the statutory definition of obtaining property by false pretenses shows that the false representation need not be made to the actual victim. N.C. Gen. Stat. § 14-100(a) (2005) provides:

> [I]t shall not be necessary to prove either an intent to defraud any particular person or that the person to whom the false pretense was made was the person defrauded, but it shall be sufficient to allege and prove that the party accused made the false pretense charged with an intent to defraud.

Id.

For these reasons, we find that the trial court did not err in denying defendant's motion to dismiss for insufficient evidence.

III. Jury Instructions

Finally, defendant contends the trial court erred in failing to instruct the jury on the lesser-included offense of misdemeanor larceny. We disagree.

Since defendant failed to raise this issue before the trial court, we review under plain error analysis. *State v. Odom*, 307 N.C. 655, 659-62, 300 S.E.2d 375, 378-79 (1983). The plain error rule only applies in truly exceptional cases. *Id.* at 660, 300 S.E.2d at 378. To constitute plain error, the appellate court must be convinced that absent the error, the jury probably would have reached a different verdict. *Id.*

In this case, the State requested the trial court charge the jury on the lesser-included offense of misdemeanor larceny at the charge conference. In response, defendant's attorney stated, "I don't believe it's a lesser included offense. I may be wrong." (R p. 47). The trial court subsequently denied the State's request for the jury instruction, and defendant did not object to the jury instructions at any time.

Defendant's attorney invited error by stating he did not believe misdemeanor larceny to be a lesser-included offense and responding in the negative when the trial court specifically asked for any additions or deletions to the jury instructions. "Under the doctrine of invited error, 'a defendant is not prejudiced by . . . error resulting from his own conduct.'" *State v. Walker Browning & Hernandez*, 167 N.C. App. 110, 117, 605 S.E.2d 647, 653 (2004) (quoting N.C. Gen. Stat. § 15A-1443(c) (2003)). "'[A] defendant may not decline an opportunity for instructions on a lesser included offense and then claim on appeal that failure to instruct on the lesser included offense was error.'" *Id.* (quoting *State v. Gay*, 334 N.C. 467, 489, 434 S.E.2d 840, 852 (1993)); *See also State v. Williams*, 333 N.C. 719, 727-28, 430 S.E.2d 888, 892-93 (1993). Thus, defendant foreclosed any inclination of the trial court to instruct on the lesser-included offense of misdemeanor larceny and is not entitled to relief on appeal. This argument is without merit.

NO ERROR.

JUDGES LEVINSON and STEPHENS concur.

Report per Rule 30(e).