NO. COA13-326
NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2013

STATE OF NORTH CAROLINA

v. Martin County
Nos. 10 CRS 50245
STERLING LAMONT GRESHAM 11 CRS 40

Appeal by defendant from judgment entered 18 July 2012 by Judge W. Russell Duke, Jr., in Martin County Superior Court. Heard in the Court of Appeals 30 September 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Aimee Escueta Margolis, for the State.

Guy J. Loranger for defendant-appellant.

HUNTER, Robert C., Judge.

A jury found defendant guilty of attempted obtaining property by false pretenses, whereupon he pleaded guilty to attaining habitual felon status. The trial court sentenced him to an active prison term of 60 to 81 months. Defendant gave notice of appeal in open court. After careful review, we find no error.

Defendant first claims the trial court erred in denying his motion to dismiss the charge at the conclusion of the evidence due to a fatal variance between the indictment and the State's proof. We review the court's ruling *de novo*. *State v. Lowery*, __ N.C. App. __, __, __ S.E.2d __, __ (July 2, 2013) (COA12-1129).

"'A motion to dismiss [for a variance] is in order when the prosecution fails to offer sufficient evidence the defendant committed the offense charged. A variance between the criminal offense charged and the offense established by the evidence is in essence a failure of the State to establish the offense charged.'" *State v. Pickens*, 346 N.C. 628, 646, 488 S.E.2d 162, 172 (1997) (quoting *State v. Waddell*, 279 N.C. 442, 445, 183 S.E.2d 644, 646 (1971)). "In order for a variance to warrant reversal, the variance must be material. A variance is not material, and is therefore not fatal, if it does not involve an essential element of the crime charged." *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002) (internal citations omitted). "When an averment in an indictment is not necessary in charging the offense, it will be 'deemed to be surplusage.'" *Pickens*, 346 N.C. at 646, 488 S.E.2d at 172 (citation omitted).

The elements of obtaining property by false pretenses are: "(1) a false representation of a past or 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 the defendant obtains or attempts to obtain anything of value from another person." *State v. Compton*, 90 N.C. App. 101, 103, 367 S.E.2d 353, 354 (1988). However, actual deception by the defendant's misrepresentation is not an essential element of the crime of attempting to obtain property by false pretenses. *State v. Wilburn*, 57 N.C. App. 40, 46, 290 S.E.2d 782, 786 (1982). "The gist of [the offense] is the false representation of a subsisting fact intended to and which does deceive one from whom property is obtained." *State v. Linker*, 309 N.C. 612, 614-15, 308 S.E.2d 309, 310-11 (1983). "The State must prove . . . that defendant made the misrepresentation as alleged" in the indictment. *Id.* at 615, 308 S.E.2d at 311. "If the [S]tate's evidence fails to establish that [the] defendant made this misrepresentation but tends to show some other misrepresentation was made, then the [S]tate's proof varies fatally from the indictment[]." *Id.* (footnote omitted)

The indictment in this case alleged as follows:

> [D]efendant . . . did . . . attempt to obtain U.S. Currency, from Charles Cherry,

> by means of a false pretense which was calculated to deceive and did deceive. The false pretense consisted of . . . defendant telling Charles Cherry that he had kidnapped Charles Cherry's cousin, Miles Green,[1] and the defendant was holding Miles Green for ransom [sic] that Charles Cherry needed to provide; when in fact, the defendant had not kidnapped Miles Green.

Defendant asserts that the State's proffer varied from these allegations in two respects. First, he contends that "the State's evidence tended to prove that Green, not [defendant], told Cherry that he was being held by [defendant], and he needed Cherry to pay money so he could leave." Second, defendant notes that neither he nor Green ever referred to a "'kidnapping' or 'ransom'" when speaking to Cherry.

To the extent defendant claims the evidence showed it was Green, and not defendant, who made the false representations to Cherry, we note that the trial court instructed the jury on the doctrine of concerted action. An indictment need not allege that a defendant acted in concert with another person to commit the essential elements of the crime charged. *See State v. Estes*, 186 N.C. App. 364, 371, 651 S.E.2d 598, 603 (2007), *appeal dismissed and disc. review denied*, 362 N.C. 365, 661 S.E.2d 883 (2008). Thus, it is immaterial whether defendant or

[1] Although the trial transcript and appellee's brief spell the name "Greene," we rely on the spelling used in the indictment.

Green made a particular statement to Cherry, given the State's evidence that they joined together to "scam [Cherry] out of $350.00."

To the extent defendant claims a fatal variance based on the lack of witness testimony of a staged "kidnapping" and a demand for "ransom," we are wholly unpersuaded. Kidnapping is defined, *inter alia*, as unlawfully confining or restraining a person without his consent for the purpose of "[h]olding such other person for a ransom[.]" N.C. Gen. Stat. § 14-39(a)(1) (2011). Ransom, in turn, denotes "[m]oney or other consideration demanded or paid for the release of a captured person or property." Black's Law Dictionary 1374 (9th ed. 2009). Here, defendant told Cherry he was "[h]olding [Green] until he got the money." When asked what defendant said exactly, Cherry testified: "That I needed to come up with 300 -- it started out to be 350. Then it was $300 because that's all I told him I could come up with, and I could come and get Miles . . . ." Any distinction between this evidence and the indictment's allegations of a phony "kidnapping" intended to obtain "ransom" from Cherry were immaterial.

Defendant next asserts that the trial court improperly expressed an opinion on the merits of the case while questioning

a State's witness. *See* N.C. Gen. Stat. § 15A-1222 (2011). At the conclusion of the parties' examination of Green, the court posed some additional questions, as follows:

> THE COURT: Mr. Green, in your own words tell us what the idea was that night. What was going on?
>
> . . . .
>
> A. Well, I went over there to – to pay Nicole [Perkins] because I knew my cousin said that he was going to give me the money, so I went over there to pay Nicole, and I was getting high at the time so – I mean it just seemed like an all right idea, and then, you know, [defendant] came and –
>
> THE COURT: Then what happened.
>
> A. *Then it kind of fell into place: Well we can say that you're not going to let me go nowhere so we can get the money because he's just not going to give it to me.*
>
> THE COURT: *So this was an agreement between you and – and the defendant*?
>
> A. Yes, sir.
>
> THE COURT: And what was the agreement?
>
> A. To act like I was being held so we could get the money.

(Emphasis added.) Defendant contends that, by invoking the term "agreement," the court "elicited the trial's only direct evidence tending to show that such an agreement existed between [defendant] and Green[.]" Defendant further suggests that

"[t]he form of the question amounted to the court assuming that such an agreement existed."

Pursuant to its authority under N.C. R. Evid. 614(b), the trial court "may question a witness in order to clarify confusing or contradictory testimony." *State v. Quick*, 329 N.C. 1, 21-22, 405 S.E.2d 179, 192 (1991) (citation and quotation marks omitted). However, the court "may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1222 (2011). "Whether a trial court's comment constitutes an improper expression of opinion 'is determined by its probable meaning to the jury, not by the judge's motive[,]'" and is assessed under the totality of the circumstances. *State v. Mucci*, 163 N.C. App. 615, 620, 594 S.E.2d 411, 415 (2004). "Further, a defendant claiming that he was deprived of a fair trial by the judge's remarks has the burden of showing prejudice in order to receive a new trial." *State v. Anthony*, 354 N.C. 372, 402, 555 S.E.2d 557, 578 (2001) (citation and quotation marks omitted).

We find no improper expression of opinion by the trial court. By questioning Green, the court in no way implied that it found his testimony to be credible. Nor did the court's use

of the term "agreement" suggest an opinion on a question of fact before the jury, but sought to clarify what the "it" was that "kind of fell into place" for Green after defendant's arrival. Moreover, the existence of an agreement between defendant and Green was not an issue before the jury, inasmuch as it was not an element of the charged offense. *See Estes*, 186 N.C. App. at 371, 651 S.E.2d at 603. Finally, the court instructed jurors on its impartiality and admonished them not to infer from "any question I've asked a witness or anything else that I may have said or done" that the court had "intimated an opinion" as to any matter. Insofar as defendant separately claims that the court's questioning of Green violated his right to due process, we hold that he failed to preserve this constitutional issue by raising it in the trial court. *See, e.g.*, *State v. Anderson*, 350 N.C. 152, 185, 513 S.E.2d 296, 316 (1999). Accordingly, his assignment of error is overruled.

NO ERROR.

Judges BRYANT and McCULLOUGH concur.

Report per Rule 30(e).