NO. COA14-369

NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

STATE OF NORTH CAROLINA

v. Edgecombe County
Nos. 13 CRS 51229—30

KAWANA SPRUILL and RICHARD CONOLEY CHAPMAN

Appeal by defendants from judgments entered 18 December 2013 by Judge Walter H. Godwin, Jr., in Edgecombe County Superior Court. Heard in the Court of Appeals 9 September 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General David J. Adinolfi II, for the State.

Smith, James, Rowlett & Cohen, LLP, by Seth R. Cohen, for defendant-appellants.

BRYANT, Judge.

Because the jury was presented with substantial evidence of each essential element of the charge that defendants operated or placed into operation an electronic machine to conduct a sweepstakes through the use of an entertaining display, including the entry process or the "reveal" of a prize, we affirm the trial court's denial of defendants' motion to dismiss and find no error in the judgment of the trial court.

On 23 April 2013, a magistrate in Edgecombe County issued arrest warrants for defendants Kawana Spruill and Richard Conoley Chapman on the charge of violating North Carolina General Statutes, section 14-306.4 ("Electronic machines and devices for sweepstakes prohibited"). The matter came on for trial before a jury in Edgecombe County Superior Court on 17 December 2013, the Honorable Walter H. Godwin, Jr., Judge presiding.

The evidence presented at trial tended to show that defendant Chapman was the owner of Past Times Business Center ("Past Times"), an internet café, located at 2100 St. Andrews Street, Tabor City, and defendant Spruill was the manager. An undercover officer with the Tabor City Police Department went to Past Times to determine if the café was operating an electronic sweepstakes in violation of N.C. Gen. Stat. 14-306.4. The undercover officer testified that he went to Past Times on 11 April 2013, equipped with a surveillance camera. The surveillance video was played for the jury while the officer narrated. The officer presented the cashier with $25.00. The cashier presented the officer with a disclaimer which states, in part:

> I understand that I am purchasing computer time to be used at this location. I also

> realize that I can request to participate in the promotional game for free. . . .
>
> . . .
>
> I understand that I am not gambling. I am playing a promotional game in which the winners are predetermined. The games have no effect on the outcome of the prizes won.

The undercover officer played internet games with the names "Keno," "Lucky's Loot," Lucky's Loot bonus round named "Pot O'Gold," "Lucky Sevens," "Lucky Ducks," and "Lucky Lamb." The undercover officer testified that his understanding was "[y]ou cannot win any more money than what it says you're already going to win before the game starts. So it's irrelevant what you click on." The lead investigator, Detective Sergeant Bruce Edwards, testified that Past Times' electronic games used a pre-reveal system. The pre-reveal system showed the prize amount the patron would win prior to the patron playing a game. Once the game was completed, the prize amount revealed prior to the start of the game would be displayed again. Kevin Morse, a representative from the video game manufacturer Figure Eight, testified that the software used to make the electronic games available in Past Times was developed and controlled by Figure Eight and that Past Time paid a user licensing fee to access the games via the internet. Morse distinguished a "true

sweepstakes," where the prize is revealed after the game is completed, from the electronic games used in Past Times, where the prize is revealed before a game is played. At Past Times, the patron has the option of whether to play the game after the prize has been revealed. If the patron does not timely choose to play a game, the system prompts the next reveal opportunity.

At the close of the evidence, the jury returned verdicts against Chapman and Spruill finding each "[g]uilty of operating or placing into operation an electronic machine or device for the purpose of conducting a sweepstakes through the use of an entertaining display, including the entry process or the revealing of a prize[.]" The trial court entered judgment in accordance with the jury verdicts. Spruill was sentenced to an active term of 45 days. The sentence was suspended, and she was placed on unsupervised probation for a period of 12 months. Chapman was also sentenced to an active term of 45 days. This sentence was suspended, and he was placed on unsupervised probation for a period of 36 months. Both defendants appeal.

On appeal, defendants argue the trial court erred in denying their motion to dismiss. Defendants contend that there was not substantial evidence they conducted a sweepstakes

through the use of an entertaining display, including the entry process or the revealing of a prize in violation of N.C. Gen. Stat. § 14-306.4. We disagree.

"We review denial of a motion to dismiss criminal charges *de novo*, to determine whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Mobley*, 206 N.C. App. 285, 291, 696 S.E.2d 862, 866 (2010) (citation and quotations omitted). "[T]he trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence. . . . The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility." *State v. Trogdon*, 216 N.C. App. 15, 25, 715 S.E.2d 635, 641 (2011) (citations and quotations omitted).

Pursuant to North Carolina General Statutes, section 14-306.4,

> it shall be unlawful for any person to operate, or place into operation, an electronic machine or device to do either of the following:
>
> > (1) Conduct a sweepstakes through the use of an entertaining display, including the entry process or the

> reveal of a prize.
>
> (2) Promote a sweepstakes that is conducted through the use of an entertaining display, including the entry process or the reveal of a prize.

N.C. Gen. Stat. § 14-306.4(b) (2013). "Entertaining display" is defined as "visual information, capable of being seen by a sweepstakes entrant, that takes the form of actual game play, or simulated game play . . . ." *Id.* § 14-306.4(a)(3). An entertaining display can be "[a]ny [] video game not dependent on skill or dexterity that is played while revealing a prize as the result of an entry into a sweepstakes." *Id.* § 14-306.4(a)(3)(i). "Sweepstakes" is defined as "any game, advertising scheme or plan, or other promotion, which, with or without payment of any consideration, a person may enter to win or become eligible to receive any prize, the determination of which is based upon chance." *Id.* § 14-306.4(a)(5).

Defendants contend that because the prize is revealed to the patron prior to any opportunity to play a game, they have not run afoul of the plain meaning of N.C.G.S. § 14-306.4. Previously, games were used to reveal the sweepstakes prize. But, according to Figure Eight representative Morse, the software accessible from Past Times was changed to incorporate

the pre-reveal feature, specifically, to operate in compliance with N.C.G.S. § 14-306.4.

> [N]o sooner is a lottery defined, and the definition applied to a given state of facts, than ingenuity is at work to evolve some scheme of evasion which is within the mischief, but not quite within the letter of the definition. But, in this way, it is not possible to escape the law's condemnation, for it will strip the transaction of all its thin and false apparel and consider it in its very nakedness. It will look to the substance and not to the form of it, in order to disclose its real elements and the pernicious tendencies which the law is seeking to prevent. The Court will inquire, not into the name, but into the game, however skillfully disguised, in order to ascertain if it is prohibited[.] It is the one playing at the game who is influenced by the hope enticingly held out, which is often false or disappointing, that he will, perhaps and by good luck, get something for nothing, or a great deal for a very little outlay. This is the lure that draws the credulous and unsuspecting into the deceptive scheme, and it is what the law denounces as wrong and demoralizing.

Hest Technologies, Inc. v. State ex rel. Perdue, 366 N.C. 289, 289—90, 749 S.E.2d 429, 430—31 (2012) (citing *State v. Lipkin*, 169 N.C. 265, 271, 84 S.E. 340, 343 (1915)), *cert. denied*, ___ U.S. ___, ___ L. Ed. 2d ___ (2013).

It is undisputed that with the use of computers accessing the internet, defendants operated a sweepstakes wherein a prize was revealed to a patron not dependent upon the patron's skill

or dexterity in playing a video game. *See* N.C.G.S. § 14-306.4(a)(3)(i). That the video game did not have to be played or played to completion is not determinative. Defendants appear to define "game" only as that interaction between patron and computer which occurs after the sweepstakes prize has been revealed and the patron presses the "game" button. We disagree.

Under the pre-reveal format, entry and participation in the sweepstakes, through the pre-reveal, is a prerequisite to playing a video game. Thus, the sweepstakes takes place during the initial stages of any game played. That the sweepstakes is conducted at the beginning of a game versus its conclusion makes no significant difference: the sweepstakes prize is not dependent upon the skill or dexterity of the patron; it is a game of chance. And, in conjunction, the electronic video game is a display which entices the patron to play.

Section 14-306.4 seeks to prevent the use of entertaining displays in the form of video games to conduct sweepstakes wherein the prize is determined by chance. *See id.* § 14-306.4(b)(1). Therefore, when viewed in the light most favorable to the State, it is clear that the jury was presented with substantial evidence of each essential element of the charge that defendants operated or placed into operation an electronic

machine to conduct a sweepstakes through the use of an entertaining display, including the entry process or the reveal of a prize. *See id.*; *see also Trogdon*, 216 N.C. App. at 25, 715 S.E.2d at 641. Therefore, we affirm the trial court's denial of defendants' motion to dismiss the charge and find no error in the judgment of the trial court. *Mobley*, 206 N.C. App. at 291, 696 S.E.2d at 866. Accordingly, defendant's argument is overruled.

No error.

Chief Judge McGEE and Judge STROUD concur.