

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA14-546
NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

STATE OF NORTH CAROLINA

v.

Cumberland County
No. 12 CRS 056386

DARYL F. HUBBARD

Appeal by defendant from judgment entered 22 January 2014
by Judge James G. Bell in Cumberland County Superior Court.
Heard in the Court of Appeals 10 November 2014.

*Attorney General Roy Cooper, by Assistant Attorney General
Brent D. Kiziah, for the State.*

Adrian M. Lapas for defendant-appellant.

ELMORE, Judge.

Defendant Daryl F. Hubbard appeals from the judgment entered after a jury found him guilty of attempted obtaining property by false pretenses. Defendant contends the trial court erred by denying his motion to dismiss the charge and that it lacked jurisdiction to enter judgment because the indictment charging the offense was facially defective. Both of defendant's arguments depend on his assertion that the offense

of attempted obtaining property by false pretenses must involve the successful deception of the victim. We find no error.

On 17 May 2012, a loss prevention specialist ("LPS") at a Fayetteville Wal-Mart saw Tiffany Jackson enter the store and proceed to the baby section holding a receipt. Ms. Jackson looked back and forth between the receipt and the store shelves several times before she picked a package of diapers. Ms. Jackson also selected a bag of dog food in the same way. Ms. Jackson then left the store without paying for the items. The LPS did not intervene because store policy required two specialists to intervene. Instead, the LPS called for assistance and went to the loss prevention office to monitor Ms. Jackson via security cameras.

The LPS saw Ms. Jackson load the items in her car in the store's parking lot and then drive to another part of the lot. Defendant got out of another car, took the merchandise from Ms. Jackson, and walked back towards the store. Defendant walked directly to the customer service counter and attempted to return the items using a receipt that looked suspicious to the customer service agent ("CSA"), because it was wrinkled and looked "like it's been walked all over." The CSA brought defendant's receipt to the loss prevention office, and the LPS also noticed that the

receipt was wrinkled and dirty, as if it had been picked up off the ground. The LPS researched the original transaction described on the receipt and determined neither Ms. Jackson nor defendant made the purchase. A police officer took defendant to the loss prevention office and then to the police station.

A jury found defendant guilty of attempted obtaining property by false pretenses. The trial court sentenced defendant to 5 to 15 months in prison, suspended the sentence, and placed defendant on probation for 18 months. Defendant appeals.

On appeal, defendant makes two inter-related arguments regarding the sufficiency of the evidence and facial validity of the indictment. In both arguments, defendant contends the offense of attempted obtaining property by false pretenses requires the successful deception of the victim. Because we disagree with defendant's underlying legal contention, we reject both arguments.

We have previously rejected defendant's interpretation of N.C. Gen. Stat. § 14-100 (2013), which criminalizes obtaining property by false pretenses and the attempt to do so. In *State v. Wilburn*, 57 N.C. App. 40, 46, 290 S.E.2d 782, 786 (1982), the defendant also argued that the failure to present evidence that

he actually deceived the victim negated the intent necessary to support a conviction for attempted obtaining property by false pretenses. This Court rejected that argument, and instead held, “[i]t is not necessary, in order to establish an intent, that the [victim] should have been deceived[.]” *Id.* (citation and quotation marks omitted).

Defendant acknowledges that this Court is bound by its prior resolution of the issue in *Wilburn*, but argues that *Wilburn* was decided contrary to prior case law, which required the victim to actually be deceived. Defendant’s argument, however, is unavailing. The cases defendant cites involve situations where a defendant did, in fact, obtain property by means of false pretenses. Under those circumstances the offense is not *attempted*, but completed. Accordingly, those cases are not relevant to our disposition of this issue, and there is no conflict in the case law.

No error.

Judges STEELMAN and DILLON concur.

Report per Rule 30(e).