IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-163

Filed: 15 December 2015

Duplin County, No. 13 CRS 51326

STATE OF NORTH CAROLINA

v.

APRIL JAMES BIZZELL, Defendant.

Appeal by defendant from judgments entered 31 July 2014 by Judge Phyllis M. Gorham in Duplin County Superior Court. Heard in the Court of Appeals 26 August 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Scott T. Slusser, for the State.

Richard Croutharmel, for defendant-appellant.

CALABRIA, Judge.

April James Bizzell ("defendant") appeals from judgments entered upon jury verdicts finding her guilty of felony larceny and obtaining property by false pretenses. Defendant contends that the trial court (1) lacked jurisdiction over the false pretenses charge because the indictment was fatally defective, and (2) erred by denying her motion to dismiss the felony larceny charge for insufficient evidence. We conclude defendant received a fair trial free from error.

I. Background

The State presented the following evidence: On 31 May 2013, Barbara Miller was getting dressed for a dinner when she discovered her herringbone necklace was damaged and half of it was missing. When Barbara checked her jewelry box, she noticed no other jewelry missing. Barbara and her husband lived alone, and the only other person who entered their home was Janice James. Janice had cleaned the Miller's home for years.

On 1 June 2013, Barbara called Janice to investigate. Janice stated that she knew nothing about the necklace but that she would ask her daughter, defendant, who had recently begun helping Janice clean the Miller's home. Janice and defendant had last cleaned Barbara's home on 29 May 2013, two days before Barbara discovered that half of her herringbone necklace was missing.

On 4 June 2013, Barbara reported the incident to Officer Mike Stevens of the Duplin County Sheriff's Office. Officer Stevens checked the local pawnshops but found nothing. Barbara subsequently conducted a thorough search of her home and provided the sheriff's office with an inventory of jewelry that she discovered missing: a man's gold ring, two bracelets, and two necklaces. Officer Stevens checked the pawnshops again and found two necklaces matching Barbara's descriptions at Pawn

USA, Inc. Todd Taylor, Pawn USA's manager, provided Officer Stevens the two necklaces and a corresponding pawn ticket indicating that defendant exchanged the jewelry for an $80.00 loan. The pawn ticket contained defendant's signature, pledging that she was the owner of the necklaces. Officer Stevens subsequently arrested defendant and charged her with misdemeanor larceny and obtaining property by false pretenses.

On 9 September 2013, a Duplin County Grand Jury indicted defendant on charges of misdemeanor larceny and obtaining property by false pretenses. On 2 June 2014, a Duplin County Grand Jury issued a superseding indictment on charges of felony larceny, obtaining property by false pretenses, and larceny by employee. The case was heard at the 28, 29, 30, and 31 July 2014 Criminal Sessions of Duplin County Superior Court before the Honorable Phyllis M. Gorham. On 31 July 2014, a Duplin County Jury returned a verdict finding defendant guilty of felony larceny and obtaining property by false pretenses. The trial court sentenced defendant to a minimum of 6 months and a maximum of 17 months to be served in the North Carolina Division of Adult Correction and ordered defendant to pay $2,000.00 in restitution. Defendant appeals.

II. Sufficiency of Indictment

Defendant contends the trial court lacked jurisdiction over the false pretenses charge because the indictment was fatally defective in that (1) it failed to allege

defendant had made a false representation, and (2) a material variance existed between the false pretense alleged in the indictment and the evidence presented at trial.

A. Allegation of False Representation

Defendant contends the obtaining property by false pretenses indictment was fatally defective because it failed to allege defendant made a false representation. We disagree.

The sufficiency of an indictment is reviewed *de novo* on appeal. *State v. Marshall,* 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008). "[T]o sustain a charge of obtaining property by false pretenses, the indictment must state the alleged false representation." *State v. Braswell,* 225 N.C. App. 734, 740, 738 S.E.2d 229, 233 (2013) (citing *State v. Linker*, 309 N.C. 612, 614-15, 308 S.E.2d 309, 310-11 (1983)). Representation of a false pretense "need not come through spoken words, but instead may be by act or conduct." *State v. Parker,* 354 N.C. 268, 284, 553 S.E.2d 885, 897 (2001).

In the instant case, the indictment returned against defendant stated:

> [T]he jurors for the State upon their oath present that on or about the date of offense shown and in Duplin County the defendant named above unlawfully, willfully, and feloniously did knowingly and designedly with the intent to cheat and defraud, obtain or attempt to obtain $80.00 in United States currency from Pawn USA, Incorporated doing business as Pawn USA of Wallace, North Carolina, 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 selling stolen property.

Defendant contends the indictment was fatally defective because "[a]n allegation that a defendant sold stolen property, standing alone, fails to assert that the defendant made a false representation." We disagree.

> In *Cronin,* the defendant challenged the sufficiency of his indictment for obtaining property by false pretenses because, in part, it failed to directly allege "that defendant did in fact deceive the [victim bank]," a necessary element of the offense. 299 N.C. at 236, 262 S.E.2d at 282. The Court explained that the indictment at issue "alleged that defendant knowingly and falsely made false representations to the bank that he was offering as security for a loan a new mobile home having value of $10,850, when actually the offered security was a fire-damaged mobile home of the value of $2,500, and that defendant by means of such false pretense and with intent then and there to defraud the bank received from the bank the sum of $5,704.54." *Id.* at 238, 262 S.E.2d at 283. In concluding that the indictment was adequate, the Court explained: "If the false pretense caused the victim to give up his property, it logically follows that the property was given up because the victim was in fact deceived by the false pretense." *Id.* Thus, the Court upheld the indictment since the allegations were "sufficient to raise a *reasonable inference* that the bank made the loan because it was deceived by defendant's false representations." *Id.* (emphasis added).

State v. Seelig, 226 N.C. App. 147, 152, 738 S.E.2d 427, 431-32, *disc. review denied*, 366 N.C. 598, 743 S.E.2d 182 (2013) (analyzing *State v. Cronin*, 299 N.C. 229, 262 S.E.2d 277 (1980)).

In *Seelig*, the defendant challenged the sufficiency of his indictment for obtaining property by false pretenses because the indictment failed to sufficiently allege he made a false representation. *Id.* at 152, 738 S.E.2d at 431. The false pretense listed on the indictment stated in pertinent part: "[T]he defendant . . . did . . . obtain U.S. currency . . . by means of a false pretense[:] . . . The defendant sold bread products . . . that were advertised and represented as Gluten Free when in fact the defendant knew at the time that the products contained Gluten." *Id.* The defendant argued the indictment never alleged either " 'that [defendant] himself "advertised and represented" the bread products as gluten-free or that [defendant] was the agent of the entity that "advertised and represented" the products as gluten-free.' " *Id.* This Court concluded that, as in *Cronin*, "the allegations in the indictments were 'sufficient to raise a reasonable inference' that defendant, who was expressly alleged to have obtained value from the victim *by means of* a false pretense, was also the person who made the false representation that the products contained gluten." *Id.* at 153, 738 S.E.2d at 432.

In the instant case, the indictment alleged that the false representation was the act of "selling stolen property." It logically follows that "selling stolen property" identifies the false pretense that defendant represented she was the true owner of the property when in fact she was not. At the very least, as in *Cronin* and *Seelig*, the allegations were "sufficient to raise a reasonable inference" that defendant, by her

act of furnishing jewelry she did not own but pledged was hers in exchange for $80.00 from Pawn Shop USA, made a false representation to Pawn Shop USA that she owned the property. The false pretenses indictment returned against defendant sufficiently apprised her that she had been accused of falsely representing that she owned the jewelry as an attempt to fraudulently obtain $80.00. Therefore, we overrule defendant's challenge.

B. Fatal Variance

Defendant contends there was a fatal variance between the indictment and the proof presented at trial. The indictment described the false pretense as "selling stolen property." Defendant contends the State presented insufficient evidence that she "sold" the two necklaces; rather, the evidence showed defendant used the necklaces as "collateral" for a cash loan. Defendant contends the trial court therefore should have granted her motion to dismiss based upon this fatal variance. We disagree.

" '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. Everette*, __ N.C. App. __, __, 764 S.E.2d 634, 638 (2014) (quoting *State v. Norman,* 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002)). "Obtaining property by false pretenses consists of four elements: '(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.' " *Seelig*, 226 N.C. App. at 156, 738 S.E.2d at 431 (quoting *Cronin,* 299 N.C. at 242, 262 S.E.2d at 286). "If the state's evidence fails to establish that defendant made [the alleged] misrepresentation but tends to show some other misrepresentation was made, then the state's proof varies fatally from the indictments." *Linker*, 309 N.C. at 614-15, 308 S.E.2d at 310-11.

In the instant case, defendant contends "the State alleged in its indictment that [defendant] had 'sold stolen property' but the evidence showed that she had used property that had recently been reported as stolen as collateral for a loan." Whether the jewelry was "sold" or "collateralized" is not an essential element of obtaining property by false pretenses. *See Cronin*, 299 N.C. at 242, 262 S.E.2d at 285 ("We have held that the crime of obtaining property by false pretense is committed when one obtains a loan of money by falsely representing the nature of the security given."). The allegations of the indictment and the evidence presented at trial showed the same false representation made by defendant: representing the property was hers when in fact it was not. A jury could reasonably infer that defendant, through her actions, falsely represented to Pawn USA that Barbara's jewelry was actually her own. Therefore, no fatal variance existed between the indictment and the evidence presented at trial. We overrule defendant's challenge.

III. Sufficiency of the Evidence of Felony Larceny

Defendant contends the trial court erred by denying her motion to dismiss the felony larceny charge because "the State had failed to present substantial evidence linking [defendant] to the pieces of jewelry other than the two necklaces found at the pawnshop." We disagree.

This Court reviews *de novo* the denial of a motion to dismiss for insufficient evidence. *State v. Robledo,* 193 N.C. App. 521, 525, 668 S.E.2d 91, 94 (2008). The inquiry is "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. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (internal quotation marks and citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith,* 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "[A]ll evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence." *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009) (citations and internal quotation marks omitted). "[I]f 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. McNeil*, 359 N.C. 800, 804, 617 S.E.2d 271, 274 (2005) (brackets, citations, and quotation marks omitted). When considering

circumstantial evidence, the jury is permitted to draw an inference from an inference. *State v. Childress*, 321 N.C. 226, 232, 362 S.E.2d 263, 267 (1987).

N.C. Gen. Stat. § 14-72(a)(2015) defines felony larceny as "larceny of goods of the value of more than one thousand dollars[.]" The original indictment charged defendant only with misdemeanor larceny related to the two necklaces Barbara reported as missing, whereas the superseding indictment alleged defendant had taken several other pieces of jewelry. Specifically, defendant challenges the charge on the grounds there was insufficient evidence to support felony larceny because "[b]esides the two necklaces that were found at the pawnshop, none of the other pieces of jewelry were ever linked to [defendant]." We disagree.

At trial, Taylor identified by pawn ticket serial number the two necklaces defendant furnished to Pawn Shop USA on 31 March 2012 for an $80.00 loan. He testified that defendant used to work at Pawn Shop USA and that she frequented the store to borrow or sell items of value, usually jewelry. Janice testified that she cleaned Barbara's home for four or five years before she enlisted defendant's help, which occurred only during the Spring of 2013, around the same time that Barbara discovered her half-missing necklace. Four witnesses also testified that defendant helped clean their houses, and they all discovered jewelry missing from their homes during the Spring of 2013.

Barbara testified that she lived alone with her husband and that the only other person with access to her home was Janice, who had cleaned her home for years without incident. After Barbara discovered her half-missing necklace, she discovered several other pieces of jewelry were missing. Barbara testified that her damaged, half-missing herringbone necklace was purchased for approximately $4,000.00; that her missing pair of gold earrings were purchased for approximately $400.00; and that her missing gold bracelet was purchased for approximately $275.00. Barbara further testified that her husband's missing gold ring with diamonds was worth between $400.00 and $500.00, and that his missing gold necklace was worth between $150.00 and $200.00.

When viewed in the light most favorable to the State, there was plenary evidence presented to support the felony larceny charge, such that whether the circumstantial evidence presented at trial supported a reasonable inference that defendant stole items whose value exceeded $1,000.00 was an appropriate question for the jury. Therefore, the trial court did not err in denying defendant's motion to dismiss.

IV. Conclusion

The indictment underlying defendant's obtaining property by false pretenses charge sufficiently alleged the false representation made by defendant. The indictment did not vary fatally from the evidence presented at trial. The trial court

did not err by denying defendant's motion to dismiss the felony larceny count for insufficient evidence. Accordingly, defendant received a fair trial free from error.

NO ERROR.

Judges STROUD and INMAN concur.

Report per Rule 30(e).