IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-420

Filed: 1 December 2015

Wake County, Nos. 13 CRS 209898–99

STATE OF NORTH CAROLINA,

v.

TUNISIA DAWSON.

Appeal by defendant from order entered 20 August 2014 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 6 October 2015.

Attorney General Roy Cooper, by Assistant Attorney General Thomas H. Moore, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Paul M. Green, for defendant-appellant.

BRYANT, Judge.

Where the trial court did not err in denying defendant's motion to dismiss and where the trial court did not err in its instructions to the jury, we affirm the judgment of the trial court.

On 29 April 2013, defendant Tunisia Dawson went to a Walgreens store located on Maynard Road in Cary, North Carolina. While there, she attempted to purchase

a prepaid credit card from cashier Yvonne Suarez. Defendant told Suarez that she wished to put $385.00 in cash on the card and handed her what appeared to be four $100 bills. At trial, Suarez testified that "as soon as I took the money, I know [sic] it was fake . . . ." Believing each bill to be counterfeit, Suarez attempted to elicit help from another cashier. Before she could do so, defendant grabbed the four $100 bills from Suarez and said, "Don't walk with my money." Defendant then left the store.

Suarez informed the store manager, Dereck Fugleberg, that a customer had attempted to make a purchase with counterfeit $100 bills. Fugleberg walked outside in an attempt to locate defendant, but could not find her. He returned to the store and watched video footage of defendant's attempted purchase made by the store's security camera system. Fugleberg called the Cary Police Department to report the incident. Cary Police Officer Joshua Doty was dispatched to respond to the report.

When defendant left the Walgreens store, she immediately went to a Rite Aid store, located across the street from the Walgreens. After picking up a prepaid credit card, she went to cashier Lois Settle's checkout station. Defendant told Settle that she wanted to put $200.00 on the card and handed over two $100 bills to make the purchase. Settle inspected the two bills, noticed that neither had the requisite holograms and determined both bills were likely counterfeit. She called the manager, James Donald Armstrong, to her checkout station. When Armstrong arrived, Settle told him, "I believe the bills are counterfeit." Armstrong examined the bills and told

defendant that neither was a genuine $100 bill. Defendant asked Armstrong if she could have her money back and he told her, "No." Defendant responded, "It must be the bank's fault." Defendant then left the store. Armstrong called the Cary Police Department to report the incident.

Officer Doty was at the Walgreens store interviewing Fugelberg and Suarez when he was dispatched to the Rite Aid store to respond to Armstrong's report. Officer Doty told the Walgreens employees he would return later to finish their interviews. While en route to the Rite Aid, Officer Doty was told by the dispatcher that defendant had left the Rite Aid. Officer Doty was given a description of defendant and attempted to locate her, but could not. Officer Doty then went to the Rite Aid store to interview Armstrong and Settle. He also examined the two $100 bills and determined that they were counterfeit since both bills felt odd, bore the same serial number, and lacked the requisite hologram images. Officer Doty then watched the video footage of defendant's encounter with Settle and Armstrong. As he watched the video, Officer Doty realized that he knew defendant from a previous encounter.

Officer Doty left the Rite Aid store, taking the two $100 bills and a copy of the surveillance video with him. He returned to the Walgreens store to complete his interviews of Fugelberg and Suarez and to view the surveillance video made at that store. When he left the Walgreens, he took a copy of that store's surveillance video as well.

The two $100 bills were subsequently forwarded to the U.S. Treasury Department for further analysis. The Treasury Department determined that both bills were indeed counterfeit.

Later, on 29 April 2013, Officer Doty went to the Extended Stay hotel in Cary where defendant resided. Defendant acknowledged being at one of the stores earlier that day. Officer Doty then placed her under arrest and transported her to the Cary Police Department, where she was further interviewed by Detective Matthew Pearson. Defendant denied knowing that the money she attempted to make purchases with at both the Walgreens and Rite Aid stores was counterfeit. Warrants were issued charging defendant with two counts of attempted obtaining property by false pretenses. Defendant was later indicted for two counts of "attempted obtaining property by false pretenses."

At trial, the State's evidence included testimony from seven witnesses, as well as the introduction of the two $100 bills taken from defendant at Rite Aid and the surveillance video made at the Rite Aid.[1] Defendant's evidence consisted of her own testimony, during which she acknowledged attempting to purchase gift cards at both the Walgreens and Rite Aid stores on 29 April 2013. Defendant testified that she was not aware the bills she tendered at the two stores were counterfeit.

[1] From the trial transcript, it appears that the video surveillance tape from Walgreens was not allowed into evidence.

The jury returned a guilty verdict against defendant on both counts of attempting to obtain property by false pretenses. The trial court entered judgment in accordance with the jury verdicts and sentenced defendant to an active term of five to fifteen months in the North Carolina Department of Adult Corrections. Defendant appeals.

On appeal, defendant argues the trial court (I) erred by denying her motion to dismiss at the close of all of the evidence; and (II) committed plain error by giving a "hybrid" jury instruction combining the elements of the instruction on obtaining property by false pretenses with the general "attempt" instruction.

I

Defendant first argues that the trial court erred by denying her motion to dismiss as the State failed to present sufficient evidence as to an essential element of the crimes charged. Specifically, defendant argues that, where neither clerk was deceived by the counterfeit $100.00 bills and did not part with any property in exchange for the counterfeit bills, the evidence was insufficient to show actual deception, an essential element of obtaining property by false pretenses. Because defendant was charged with and convicted of an attempted rather than a completed crime, we disagree with the basic premise upon which defendant makes her argument.

"A defendant may move to dismiss a criminal charge when the evidence is not sufficient to sustain a conviction." *State v. Robledo*, 193 N.C. App. 521, 524, 668 S.E.2d 91, 94 (2008) (citing N.C. Gen. Stat. § 15A-1227(a) (2005)). We review the denial of a motion to dismiss for insufficient evidence *de novo*. *Id.* at 525, 668 S.E.2d at 94.

The crime of obtaining property by false pretenses is defined in N.C. Gen. Stat. § 14-100, which states in pertinent part as follows:

> If any person shall knowingly and designedly by means of any kind of false pretense whatsoever, whether the false pretense is of a past or subsisting fact or of a future fulfillment or event, obtain or attempt to obtain from any person within this State any money . . . or other thing of value with intent to cheat or defraud any person of such money . . . or other thing of value, such person shall be guilty of a felony. . . .

N.C. Gen. Stat. § 14-100(a) (2013). North Carolina's appellate courts have interpreted this statute as requiring proof of the following 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 in fact does deceive; and (4) by which one person obtains or attempts to obtain something of value from another. *State v. Parker*, 354 N.C. 268, 283–84, 553 S.E.2d 885, 897 (2001).

When a defendant is charged with the *completed* offense of obtaining property by false pretenses, the completed crime requires proof, or at least proof adequate to support an inference, that the victim was deceived at the time of the offense. *See*

State v. Simpson, 159 N.C. App. 435, 439, 583 S.E.2d 714, 716–17 (2003), *aff'd per curiam*, 357 N.C. 652 (2003); *see also State v. Cronin*, 299 N.C. 229, 237–38, 262 S.E.2d 277, 283 (1980) (holding that, where defendant was charged with and convicted of the completed crime of obtaining property by false pretenses, "[i]f 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").

However, when a defendant is charged with attempted obtaining property by false pretenses, this Court has held that "actual deceit" is not an essential element of the offense:

> Defendant is incorrect in his belief that [actual deceit] is an essential element of the offense of an *attempt* to obtain property by false pretenses. It is not necessary, in order to establish an intent, that the prosecut[ing party] should have been deceived, or should have relied on the false pretenses and have parted with his property; indeed, if property is actually obtained in consequence of the prosecut[ing party's] reliance on the false pretenses, the offense is complete and an indictment for an attempt will not lie.

State v. Wilburn, 57 N.C. App. 40, 46, 290 S.E.2d 782, 786 (1982) (emphasis added) (citation omitted); *see State v. Anderson*, No. COA07-579, 2008 WL 434596, *4 (N.C. App. Feb. 19, 2008) (unpublished) ("[I]f defendant had actually deceived the manager at Food Lion, then she would have been successful in obtaining the property, and the appropriate charge would not have been 'attempt.' ").

Here, there is no question that the State's evidence established conclusively that neither Suarez at the Walgreen's store nor Settle or Armstrong at the Rite Aid store was actually deceived by the counterfeit bills defendant presented for payment on 29 April 2013. However, because defendant was charged with an attempt to obtain property by false pretenses as opposed to the completed crime in which property was actually obtained as a result of the false pretense, actual deceit is not required. Here, all the evidence shows defendant was indicted and tried for an "attempted" crime, not a completed crime. Accordingly, the trial court properly denied defendant's motion to dismiss.

II

Defendant next argues that the trial court committed plain error by giving a "hybrid" instruction combining the elements of the instruction on obtaining property by false pretenses with the general attempt instruction. Defendant claims that these instructions confused the jury and relieved the State of its burden of proving each element of the charged offenses. We disagree.

Where a defendant objected to the jury instruction but did not renew his objection prior to the jury retiring to deliberate, the standard of review is plain error. *State v. Joplin*, 318 N.C. 126, 132, 347 S.E.2d 421, 424 (1986). Though defendant, in this case, objected to the jury instructions, defendant did not renew the objection prior to the jury deliberating. Thus, in the absence of a renewed objection, under the plain

error standard, this Court must examine the entire record and determine if the alleged error had a probable impact on the jury's finding of guilt. *State v. Lawrence*, 365 N.C. 506, 516 – 17, 723 S.E.2d 326, 333 (2012) (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). Rarely will an error in the jury instructions "justify reversal of a criminal conviction" under the plain error rule. *Id.* at 517, 723 S.E.2d at 334 (citation omitted). Reversal occurs only in cases where the error is a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot be done." *Id.* at 516–17, 723 S.E.2d at 333 (citations omitted).

A trial court's jury instruction "is for the guidance of the jury" and its purpose "is to provide clear instruction which applies the law to the evidence in such a manner as to assist the jury in understanding the case and reaching a correct verdict." *State v. Smith*, 360 N.C. 341, 346, 626 S.E.2d 258, 261 (2006) (citations omitted). Here, defendant requested a proposed instruction that would require the jury to find, beyond a reasonable doubt, five elements that comprised the completed offense of obtaining property by false pretenses. However, the trial court declined to give that instruction as it was erroneous.

Defendant was charged with two counts of attempted obtaining property by false pretenses. The trial court instructed the jury only on the attempt crimes, which consisted of two elements the jury was required to find beyond a reasonable doubt: an intent to commit a substantive offense; and the performance of an act calculated

to commit the substantive offense.[2] Defendant argues that by including the general attempt instruction, "the trial court added a layer of complexity to the jury instructions that befuddled the jury rather than provid[ing] clear guidance." Specifically, defendant points to the jury's note requesting clarification on these instructions as evidence of their confusion. In its note, the jury asked "[h]ow can you get charged with 'attempt' if [the] victim is not 'deceived?' "

This question from the jury alone is not enough to show that the trial court's instruction was erroneous. Such a question could always arise when there is an instruction on an attempted crime, as the jury is instructed on what constitutes the completed crime, yet is only required to determine whether sufficient evidence exists

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[2] The jury instructions given at trial, in pertinent part, are as follows:

> For you to find the defendant guilty of attempting to obtain property by false pretenses, the State must prove two things beyond a reasonable doubt:
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> First, that the defendant intended to commit obtaining property by false pretenses. There are five elements of obtaining property by false pretenses: One, that the defendant made a representation to another; two, that this representation was false; three, that this representation was calculated and intended to deceive; four, that the victim was, in fact, deceived by this representation; and, five, that the defendant thereby obtained or attempted to obtain property from the victim.
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> And, second, that at the time the defendant had this intent, the defendant performed an act which was calculated and designed to bring about obtaining property by false pretenses but which fell short of the completed offense and which, in the ordinary and likely course of things, the defendant would have completed that crime had at [sic] the defendant not been stopped or prevented from completing the defendant's apparent course of action. Mere preparation or mere planning is not enough to constitute an attempt, but the act need not be the last act required to complete the crime.

to show, beyond a reasonable doubt, the "attempt" to commit the crime. Contrary to defendant's assertions, the trial court's instructions to the jury were proper given the attempt charges, and the jury verdicts were properly rendered based on the attempt charges. Defendant's argument is overruled.

NO ERROR.

Judges CALABRIA and ZACHARY concur.

Report per Rule 30(e).