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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-642

Filed: 2 February 2016

Randolph County, No. 12CRS056252

STATE OF NORTH CAROLINA

v.

SHAWNTAE DESHAWN ROGERS, Defendant.

Appeal by Defendant from judgment entered 19 November 2014 by Judge V. Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 16 November 2015.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Phyllis A. Turner, for the State.

James N. Freeman, Jr., for the Defendant.

DILLON, Judge.

Shawntae Deshawn Rogers (“Defendant”) appeals from a judgment entered upon a jury verdict finding him guilty of obtaining property by false pretenses. We vacate the judgment because there was a fatal variance between the indictment charging Defendant and the State’s proof at trial.

I. Background

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The evidence at trial tended to show the following: Defendant listed a motorcycle for sale on Craigslist. In the advertisement, he claimed that the motorcycle had a “clean” title, which indicates that the vehicle had not had extensive damage.¹

Tony Fenn, who lived some miles away, telephoned Defendant about the motorcycle. During the conversation, Defendant assured Mr. Fenn that the motorcycle had a clean title. Mr. Fenn drove to Liberty, Defendant’s hometown, to inspect the motorcycle and discovered that it had some damage. Defendant indicated that the damage was only minor. Due to the damage, Mr. Fenn offered \$3,200.00 for the motorcycle, significantly less than the \$6,000.00 Defendant was seeking.

Mr. Fenn indicated that he did not have the entire purchase price available. Defendant indicated that he needed \$1,000.00 to hold the motorcycle. Mr. Fenn agreed to give Defendant \$1,000.00, stating that he would return the following Friday to pay the balance and to pick up the motorcycle. Again, Defendant assured Mr. Fenn that the motorcycle had a clean title. Before leaving, however, Mr. Fenn wrote down the motorcycle’s Vehicle Identification Number (VIN).

When Mr. Fenn returned to Raleigh, he discovered that the motorcycle did not have a clean title, but rather had a salvage title. Mr. Fenn telephoned Defendant

¹Under North Carolina law, a vehicle which has undergone certain types of extensive damage is to receive a “salvage” title (as opposed to a “clean” title), which brands the vehicle on the title in one of several ways, including for example as a “salvage motor vehicle” or a “flood vehicle.” N.C. Gen. Stat. §§ 20-71.2, 71.3 (2012).

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and indicated that he did not want the motorcycle but that he wanted his \$1,000.00 back. Defendant stated that the salvage title designation was a mistake and that he would get it straightened out; however, Mr. Fenn continued to insist on a refund.

Mr. Fenn drove to Defendant's residence, but Defendant was not home. He also tried to telephone Defendant, but was unsuccessful. Mr. Fenn drove to the police department, and Defendant was subsequently arrested.

On 3 February 2014, a grand jury indicted Defendant with obtaining property by false pretenses. The matter came on for trial in superior court. Following a one and a half day trial, the jury found Defendant guilty. The trial court sentenced Defendant to prison for eight to nineteen (19) months, ordering that the sentence run consecutively with his federal sentence on an unrelated charge. Defendant entered notice of appeal in open court.

II. Analysis

Our Supreme Court has held that the elements of obtaining property by false pretenses are "(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." *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980).

On appeal, Defendant argues that there was a fatal variance between the indictment and the evidence presented at trial on the false representation element.

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Our Supreme Court has held that a conviction for obtaining property by false pretenses cannot stand where the false representation in the indictment varies materially from the false representation that is proven at trial. *State v. Linker*, 309 N.C. 612, 615, 308 S.E.2d 309, 311 (1983) (stating that if “the state’s evidence fails to establish that defendant made [the representation alleged in the indictments] . . . but tends to show some other misrepresentation was made, then the state’s proof varies fatally from the indictments”). Our Court has recently applied this holding in *Linker*. See *State v. Holanek*, ___ N.C. App. ___, ___, 776 S.E.2d 225, 236-37 (2015).

In the present case, the indictment alleged that Defendant made the following false representation:

. . . the defendant . . . unlawfully, willfully and feloniously [and] knowingly and designedly with the intent to cheat . . . **agree[d] to deliver the motorcycle when in fact the defendant failed to deliver the motorcycle.**

(Emphasis added.) However, the evidence at trial did not tend to show that Defendant had no intent to deliver the motorcycle. Rather, the misrepresentation at trial concerned whether the motorcycle had a clean title or a salvage title.

Although the indictment alleges that Defendant took Mr. Fenn’s \$1,000.00 with no intention to deliver the motorcycle, there was no evidence presented tending to show that Defendant did not intend to deliver the motorcycle when he accepted the money. Moreover, there is no indication that Defendant would not have delivered the motorcycle upon receipt of the balance of the purchase price. Instead, the evidence

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conclusively establishes that Mr. Fenn would not accept the motorcycle once he discovered the title issue. Thus, the evidence proved “some other misrepresentation,” namely that the motorcycle had a clean title when in fact the motorcycle did not have a clean title. Accordingly, we vacate Defendant’s conviction.

VACATED.

Chief Judge McGEE and Judge DAVIS concur.

Report per Rule 30(e).