IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-687

Filed: 3 November 2020

Mitchell County, No. 17 CRS 50365

STATE OF NORTH CAROLINA

v.

CHRISTOPHER LEE MCPETERS

Appeal by defendant from judgment entered 22 May 2018 by Judge William H. Coward in Mitchell County Superior Court. Heard in the Court of Appeals 3 March 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Hilda Burnett-Baker, for the State.

Cooley Law Office, by Craig M. Cooley, for defendant-appellant.

BRYANT, Judge.

Where there was no variance between the indictment and the evidence presented at trial and where the evidence was sufficient to support the charge of obtaining property by false pretenses, the trial court did not err in denying defendant's motion to dismiss. Further, there was no error in the trial court's instructions to the jury on that charge.

On 13 November 2017, defendant Christopher Lee McPeters was indicted by a grand jury on one count of being an habitual felon, one count of obtaining property by false pretenses, and one count of misdemeanor larceny. Defendant pled not guilty. The State later dismissed the misdemeanor larceny count.

On 21 May 2018, this case was tried before the Honorable William H. Coward, Superior Court Judge presiding in Mitchell County. The evidence at trial tended to show that on the afternoon of 26 September 2017, defendant entered Fred's Store in Spruce Pine carrying a small bag. Defendant was in the store for almost an hour, spending most of that time in the electronics section. The store manager began to observe defendant after she was alerted by a customer that defendant was acting suspicious. Defendant approached the manager to ask about the cellphones in the store, and the manager told defendant she would prosecute him if she caught him stealing.

Sometime later, defendant approached the front register to return a DVD player and a speaker. Per the store's return policy, a gift card is generally issued if the customer does not present a receipt for returned items. Defendant presented a receipt for the speaker, valued at $26.63, but did not have a receipt for the DVD player, valued at $21.03. Because there was a problem with the system, the store could not issue a gift card for the price of the DVD player. Defendant was given cash––$47.66 in total—for both items. Defendant was asked to show his driver's license to

complete the return, but he stated that he did not have his license because he lost his wallet. The store waived the driver's license requirement for returns and gave defendant return slips for both items. Defendant completed the return slips and signed his name as "Thomas Stevens." With the money he received for the returned items, defendant purchased a cellphone and left the store. Shortly after defendant left the store, the manager reviewed the video surveillance, where she observed defendant taking the DVD player and the speaker off the shelf. The manager made a DVD recording of the video surveillance of the time defendant was in the store, and called the Mitchell County Sheriff's Department ("MCSD") to report that a man named Thomas Stevens had fraudulently obtained a DVD player and speaker totaling $47.66.

Later that same day, defendant went to a Verizon store to activate the new cellphone and switch his current account to that cellphone. Defendant told an employee at the store that he broke his old cellphone and that he purchased the new cellphone from someone. Defendant identified himself as "Christopher McPeters," and gave his four-digit account pin number and ID to switch over his account. Photos from the video surveillance at the Verizon store were taken and sent to the Spruce Pine Police Department along with the information Verizon obtained from defendant. The police department forwarded the photos and information to the MCSD.

Defendant was later identified as the perpetrator, arrested and charged with several offenses.

Defendant presented no evidence at trial. Defendant was convicted by a jury of obtaining property by false pretenses. Defendant subsequently pled guilty to the habitual felon count. The trial court consolidated both counts and sentenced defendant to 125 to 162 months of imprisonment. Defendant appealed.

On appeal, defendant argues the trial court erred by I) denying defendant's motion to dismiss the charge of obtaining property by false pretenses, and II) instructing the jury on obtaining property by false pretenses without including specific allegations in the indictment.

I

Defendant first argues his motion to dismiss should have been granted because the State presented insufficient evidence to support the allegations in the indictment. Specifically, defendant argues a variance existed between the indictment and the evidence because the State failed to establish that he fabricated the receipt for the speaker or that he was not entitled to a refund for the speaker and DVD player. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Under a *de novo*

review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

"The purposes of an indictment are: (1) to identify the crime with which defendant is charged, (2) to protect defendant against being charged twice for the same offense, (3) to provide defendant with a basis on which to prepare a defense, and (4) to guide the court in sentencing." *State v. Holanek*, 242 N.C. App. 633, 644–45, 776 S.E.2d 225, 234 (2015) (citation and quotation marks omitted). "A variance occurs where the allegations in an indictment, although they may be sufficiently specific on their face, do not conform to the evidence actually established at trial." *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002).

"When a variance exists between allegations in the indictment and evidence presented at trial, the defendant may be deprived of adequate notice to prepare a defense." *Holanek*, 242 N.C. App. at 645, 776 S.E.2d at 234 (citation and quotation marks omitted). "In order for a variance to warrant reversal, the variance must be material." *Norman*, 149 N.C. App. at 594, 562 S.E.2d at 457. "A variance is not material, and is therefore not fatal, if it does not involve an essential element of the crime charged." *Id*.

To convict a defendant of obtaining property by false pretenses, the State must prove: "(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. Parker*, 354 N.C. 268, 284, 553 S.E.2d 885, 897 (2001) (citation omitted).

In the instant case, the indictment returned against defendant charging him with obtaining property by false pretenses alleged, in pertinent part, that defendant:

> knowingly and designedly with the intent to cheat and defraud obtain $47.66 from Fred's Inc. d/b/a Fred's store, Spruce Pine, NC, by means of a false pretense which was calculated to deceive and did deceive. The false pretense consisted of the following: while inside the Fred's store in Spruce Pine, NC, the defendant took items belonging to the store without paying for them, removed them from their original packaging, and presented them to Robert Dietz, an employee of the store, making the false representation that he had purchased the items and was returning them for a refund, and obtained a cash refund of $47.66, when in fact the defendant knew that he had not purchased the items and was not entitled to a refund.

The evidence introduced at trial established that defendant took items while inside the store and, knowing he had not purchased the items, tendered a receipt to Robert Dietz, a store employee, with the intent of receiving a refund, and in fact did receive a refund. Defendant received a refund in the amount of $47.66 even though defendant had not purchased the items and was not entitled to a refund.

However, defendant cites to *State v. Holanek*, 242 N.C. App. at 633, 776 S.E.2d at 225, in arguing there was a fatal variance between the indictment and the evidence because "the State had to prove the stereo[1] receipt was fraudulent and [that

[1] We note that the parties use different terms to reflect one of the items that was included in the return. Defendant refers to the item as a "stereo" and the State refers to the item as a "speaker."

defendant] knew it was fraudulent." However, *Holanek* is inapposite to the facts in the instant case. In *Holanek*, the defendant was indicted for obtaining property by false pretenses and the State explicitly alleged that the defendant had submitted a fraudulent "invoice" for reimbursement on his homeowner's insurance policy. *Id.* at 645, 776 S.E.2d at 235. Contrary to the indictment, the evidence at trial established that the submitted document was an estimate for services, as opposed to an invoice, which was prepared in good faith for the adjuster, and that the adjuster knew the document was an estimate. *Id.* at 645–46, 776 S.E.2d at 235. On those facts, this Court vacated the defendant's conviction because there was a fatal variance between the indictment and the evidence. *Id.* at 649, 776 S.E.2d at 237.

Here, unlike *Holanek,* the State did not represent or allege that defendant had presented a fraudulent receipt to obtain a refund. The indictment alleges defendant took items without paying for them, then presented them for a refund. Whether defendant had presented a valid or fraudulent receipt is immaterial to the fact that he made a misrepresentation—as alleged in the indictment—of purchasing items (which he had taken off a shelf in the store), and representing that he was entitled to receive a refund. The indictment was sufficient to clearly advise defendant on the charge of obtaining property by false pretenses, and thus, enabled him to prepare a proper defense. Further, the evidence at trial was consistent with the allegations in the indictment such that defendant's variance argument must fail.

Additionally, defendant raises a similar argument regarding the sufficiency of the evidence. Defendant contends the State "had to present substantial evidence that the [] stereo receipt was fraudulent, and [that he] knew it was fraudulent" to establish the misrepresentation. For the reasons stated above, this argument is without merit. We reiterate that to show a misrepresentation, the State need only prove "defendant acted knowingly with the intent to cheat or defraud." *Parker*, 354 N.C. at 284, 553 S.E.2d at 897. The representation need not be oral or written, rather it can be communicated by action. *Id*. "The gist of the offense is the attempt to obtain something of value from the owner thereof by false pretense." *State v. Walston*, 140 N.C. App. 327, 333, 536 S.E.2d 630, 634 (2000).

Here, the State presented testimony from the store manager, who testified to observing defendant with a bag as he entered the store. The bag did not appear to have bulky items. The manager was informed by a customer that defendant was acting suspicious after he had walked around the store for a while. It was only after defendant exited the store that the manager reviewed the surveillance video and discovered defendant had taken items from the store, and then received a refund for those items. The surveillance video was introduced and played for the jury as the manager testified.

The assistant manager, Dietz, also testified and stated that he did not see defendant enter the store with the items. According to the assistant manager,

defendant came to the front of the store to return two items—a DVD player and a speaker. Defendant presented a receipt only for the speaker. Defendant stated he had lost his wallet, and therefore, did not have his driver's license for the returns. Nevertheless, a refund was issued and defendant signed his name as "Thomas Steven" on the return receipts, which were admitted into evidence for the jury to view. Defendant received $47.66 for the items and subsequently purchased a cell phone from the store using the money he had just received.

Based on the evidence presented at trial, the State sufficiently demonstrated that defendant knowingly acted with the intent to defraud and receive money from the store. *See id.*, 140 N.C. App. at 333, 536 S.E.2d at 634 ("To show that a defendant committed the offense of obtaining property by false pretenses, the State must prove that there is a causal relationship between the alleged false representation and the obtaining of money, property, or something else of value.").

Accordingly, the trial court properly denied defendant's motion to dismiss as the State presented substantial evidence to support each element of obtaining property by false pretenses.

II

Defendant also argues the trial court erred by instructing the jury on a theory not set forth in the indictment. Having not objected at trial to the jury instructions, we review defendant's argument for plain error only.

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* (citation and quotation marks omitted).

As noted above, the indictment stated defendant falsely represented that he was entitled to a refund when "he took items belonging to the store without paying for them, removed them from their original packaging, and presented them to . . . an employee of the store." Defendant "obtained a cash refund of $47.66, when in fact [] defendant knew that he had not purchased the items and was not entitled to a refund."

At trial, the trial court instructed the jury as follows:

> [T]he defendant has been charged with obtaining property by false pretenses. For you to find the defendant guilty of this offense, the State must prove five things beyond a reasonable doubt:
>
> First, that the defendant made a representation to another.
>
> Second, that this representation was false.
>
> Third, that this representation was calculated and intended to deceive.
>
> Fourth, that the victim was, in fact, deceived by this representation.

> And fifth, that the defendant thereby obtained property from the victim. . . .

The trial court's instruction, which was entirely consistent with the pattern jury instruction, accurately stated the elements of obtaining property by false pretenses for the jury to find defendant guilty. *See State v. Ballard*, 193 N.C. App. 551, 555, 668 S.E.2d 78, 81 (2008) (stating that pattern jury instructions are generally an acceptable method of informing the jury of the law). The jury ultimately convicted defendant in accordance with that instruction.

Regardless, defendant argues that the trial court's "generic" charge to the jury did not specify the misrepresentation alleged in the indictment and created a fatal variance as the "jurors [could have] reasonably concluded the $26.63 stereo receipt was legitimate based on [the manager's] testimony [] but believed [that defendant] lied about the DVD player" to receive $21.03." We disagree.

"The [S]tate must prove, as an essential element of the crime, that defendant made the misrepresentation *as alleged*." *State v. Linker*, 309 N.C. 612, 615, 308 S.E.2d 309, 311 (1983) (emphasis added). "If the [S]tate's evidence fails to establish that defendant made this misrepresentation but tends to show some other misrepresentation was made, then the [S]tate's proof varies fatally from the indictments." *Id*. However, this Court has stated "[a] jury instruction that is not specific to the misrepresentation in the indictment is acceptable so long as the court finds no fatal variance between the indictment, the proof presented at trial, and the

instructions to the jury." *State v. Ledwell*, 171 N.C. App. 314, 320, 614 S.E.2d 562, 566 (2005) (citation and quotation marks omitted).

Here, considering the whole record, the indictment was sufficient to charge defendant with obtaining property by false pretenses. The evidence at trial, in turn, was consistent with the allegations in the indictment. The State presented testimony from witnesses establishing that defendant had initiated a return and received $47.66 in cash for items he did not purchase from the store. The misrepresentation was that defendant had purchased the items when in fact he had not purchased them. The trial court's instruction was sufficient especially as there was no fatal variance between the indictment, the evidence presented at trial and the instructions. Defendant can show no error, and certainly no plain error in the trial court's instructions to the jury. Therefore, defendant's argument is overruled.

NO ERROR.

Judge STROUD concurs.

Judge MURPHY concurs in result only as to Part I, concurs fully as to Part II.

Report per Rule 30(e).