NO. COA14-39

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

STATE OF NORTH CAROLINA

v.

Wake County
No. 11 CRS 218528

SHAWN ADRIAN PENDERGRAFT

Appeal by defendant from judgments entered 19 July 2013 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 11 August 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Phillip K. Woods, for the State.

W. Michael Spivey for Defendant.

ERVIN, Judge.

Defendant Shawn A. Pendergraft appeals from a judgment entered based upon his conviction for obtaining property by false pretenses and from his conviction of felonious breaking or entering in a case in which the trial court arrested judgment. On appeal, Defendant argues that the trial court lacked jurisdiction to enter judgment against him based upon his conviction for obtaining property by false pretenses, that the trial court erroneously denied his motions to dismiss the felonious breaking or entering and obtaining property by false

pretenses charges for insufficiency of the evidence, and that the trial court erroneously refused to instruct the jury that the State was required to prove beyond a reasonable doubt that Defendant did not attempt to obtain ownership of the property in question by adverse possession, erroneously instructed the jury that ignorance of the law and a mistake of law did not preclude a finding of guilt, and erroneously instructed the jury in such a manner as to place the burden of proof on the intent issue upon Defendant rather than upon the State. After careful consideration of Defendant's challenges to the trial court's judgments in light of the record and the applicable law, we conclude that the trial court's judgments should remain undisturbed.

I. Factual Background

A. Substantive Facts

On or about 27 January 2011, DLJ Mortgage Capital, Inc., acquired title to a tract of property located at 1208 Graedon Drive in Raleigh through foreclosure. On 5 July 2011, Defendant filed a deed purporting to convey the same tract of property from ONCE International Land Trust to ONCE International Land Trust. In addition, Defendant filed a "Common Law Lien" that purported to place a $1,200,000 lien upon the property and asserted that the lien could not be removed unless the party

seeking to do so came into court with "clean hands" and proved ownership of the property. Finally, Defendant filed a "Notice" asserting that the property was the "private property of ONCE International Land Trust." Defendant signed each of these documents in the capacity as Trustee for ONCE.

In early July 2011, Lee St. Peter, a real estate broker who served as DLJ's property manager and as listing agent for the Graedon Drive property, was informed by another real estate agent that someone was occupying another house that Mr. St. Peter had listed for sale in a different part of Raleigh. When he checked the real estate records maintained by the Wake County Register of Deeds for information concerning the house about which he had received the tip, Mr. St. Peter discovered the documents that Defendant had filed with respect to the Graedon Drive property.

Upon making this discovery, Mr. St. Peter went to the Graedon Drive property and found that the house was unoccupied and in good condition. On 10 July 2011, Mr. St. Peter wrote a note to Mike Sanders of Select Portfolio Servicing, an asset management company that managed the Graedon Drive property for DLJ, for the purpose of informing Mr. Sanders that he believed that someone was pretending to own the Graedon Drive property

for the purpose of selling or leasing it without having the authority to do so.

On 7 August 2011, Defendant moved into the house located on the Graedon Drive property. At the time that he entered the house, Defendant removed the doorknob and the Realtor's lockbox.[1] On the following day, Mr. St. Peter stopped by the property to confirm that a recent roof repair had been done correctly and that no leaks were occurring. Upon arriving at the property, Mr. St. Peter observed that a U-Haul van was parked in the driveway and observed, after walking up to the front of the house, that the Realtor's lockbox had been removed and that the front door knob had been changed.

After walking around the house to investigate, Mr. St. Peter returned to the front of the house, where he encountered Defendant on the sidewalk. When Mr. St. Peter asked Defendant what he was doing on the property, Defendant replied that he had "bought [the property] directly from the bank through an investment company" and that his ownership of the property was

[1]A "Realtor's lockbox" is a container that is placed on the front door of the relevant structure and contains a key that can be used to enter the premises. In the event that a real estate agent wishes to show a particular piece of property, he or she contacts a call center, identifies himself or herself as a real estate agent, and provides an identification code. After confirming the agent's status, the call center provides the agent with the combination to the lockbox, thereby enabling the agent to obtain access to the property that he or she wishes to show.

evidenced by some documents that he had in his hand. Mr. St. Peter declined to look at the papers that Defendant offered to show him and told Defendant that he was calling the Sheriff's Office.

After speaking with someone at the Sheriff's Office, Mr. St. Peter contacted Mr. Sanders for the purpose of informing him that someone was now occupying the property and inquiring of him as to whether anything had transpired that would have given Defendant the right to be on the property. In response, Mr. Sanders stated that Defendant should not be on the property.

Deputy Kevin Moore of the Wake County Sheriff's Office responded to Mr. St. Peter's call. Upon Deputy Moore's arrival, Mr. St. Peter informed Deputy Moore that no one was supposed to be in the house and that the locks had been changed. At that point, Deputy Moore checked the real estate database maintained by the Wake County Revenue Department for the purpose of ascertaining the identity of the individual or entity listed as the owner of the property and spoke with Mr. Sanders for the purpose of confirming that the property was supposed to be unoccupied. After engaging in these investigative activities, Deputy Moore approached Defendant, who handed a deed and other documents to Deputy Moore and explained to Deputy Moore that Defendant was named as the grantee on the deed and had the right

to be there on the basis of the doctrine of adverse possession. At that point, Deputy Moore and Mr. St. Peter agreed to give Defendant 24 hours within which to vacate the property.

On the following day, Deputy Moore returned to the property. At that time, Defendant continued to occupy the house and refused to unlock the door. Although Deputy Moore left the property after failing to gain access to it, he returned with a locksmith and additional deputies. After gaining entry using an unlocked side door, Deputy Moore came into the house and placed Defendant under arrest.

B. Procedural History

On 9 August 2011, a warrant for arrest was issued charging Defendant with felonious breaking or entering, obtaining property worth more than $100,000 by false pretenses, and second degree trespass. On 11 October 2011, the Wake County grand jury returned a bill of indictment charging Defendant with felonious breaking or entering, obtaining property worth more than $100,000 by false pretenses, and second degree trespass. The charges against Defendant came on for trial before the trial court and a jury at the 15 July 2013 criminal session of the Wake County Superior Court. At the close of all of the evidence, the State voluntarily dismissed the second degree trespass charge. On 18 July 2013, the jury returned verdicts

convicting Defendant of felonious breaking or entering and obtaining property worth more than $100,000 by false pretenses. The trial court arrested judgment with respect to Defendant's conviction for felonious breaking or entering and entered a judgment sentencing Defendant to a term of 44 to 62 months imprisonment based upon his conviction for obtaining property worth more than $100,000 by false pretenses. Defendant noted an appeal to this Court from the trial court's judgments.

II. Substantive Legal Analysis

A. Jurisdictional Claim

In his first challenge to the trial court's judgments, Defendant contends that the trial court lacked jurisdiction over the false pretenses charge because the indictment charging him with the commission of that offense was fatally defective. More specifically, Defendant contends that the indictment purporting to charge him with obtaining property worth more than $100,000 by false pretenses failed to allege either that Defendant had made a false representation or that there was a causal connection between any false representation that Defendant might have made and Defendant's ability to obtain the property in question. Defendant's contentions lack merit.

1. Standard of Review

Although Defendant never challenged the sufficiency of the false pretenses indictment before the trial court, an indictment may be challenged on facial invalidity grounds for the first time on appeal. *State v. Call*, 353 N.C. 400, 429, 545 S.E.2d 190, 208, *cert. denied*, 534 U.S. 1046, 122 S. Ct. 628, 151 L. Ed. 2d 548 (2001). This Court reviews challenges to the sufficiency of an indictment using a *de novo* standard of review. *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712, *disc. review denied*, 362 N.C. 368, 661 S.E.2d 890 (2008). "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. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (quotation marks and citations omitted).

2. Applicable Legal Principles

An indictment that fails to allege every element of an offense is facially invalid and does not suffice to confer jurisdiction upon a trial court. *State v. Kelso*, 187 N.C. App. 718, 722, 654 S.E.2d 28, 31 (2007), *disc. review denied*, 362 N.C. 367, 663 S.E.2d 432 (2008). In light of that general principle, "an indictment for a statutory offense is sufficient when the offense is charged in the words of the statute." *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980).

N.C. Gen. Stat. § 14-100 provides, in pertinent part, that:

> (a) 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 . . . property . . . with intent to cheat or defraud any person of such . . . property . . . such person shall be guilty of a felony: . . . Provided, further, that it shall be sufficient in any indictment for obtaining or attempting to obtain any such . . . property . . . by false pretenses to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the . . . property . . . and upon the trial of any such indictment, it shall not be necessary to prove either an intent to defraud any particular person or that the person to whom the false pretense was made was the person defrauded, but it shall be sufficient to allege and prove that the party accused made the false pretense charged with an intent to defraud.

As a result, the elements of the crime 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." *Cronin*, 299 N.C. at 242, 262 S.E.2d at 286.

3. Validity of Indictment

a. False Representation

In his first challenge to the validity of the false pretenses indictment, Defendant contends that the indictment

failed to allege that Defendant made a false representation. We disagree.

"[T]o sustain a charge of obtaining property by false pretenses, the indictment must state the alleged false representation." *State v. Braswell*, __ N.C. App. __, __, 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)). The false representation may consist of an action or conduct rather than necessarily being made by spoken words. *State v. Ledwell*, 171 N.C. App. 314, 319, 614 S.E.2d 562, 566 (2005), *cert. denied*, __ N.C. __, 699 S.E.2d 639 (2010).

The indictment returned against Defendant in this case for the purpose of charging him with obtaining property by false pretenses alleges, in pertinent part, that:

> on or about July 5, 2011 through August 9, 2011, in Wake County the defendant named above unlawfully, willfully and feloniously did knowingly and designedly with the intent to cheat and defraud, obtain a house located at 1208 Graedon Drive, Raleigh, NC, having a value of $836,918.00 from DLJ Mortgage Capital Inc., by means of a false pretense which was calculated to deceive and did deceive.
>
> The false pretense consisted of the following: The defendant moved into the house located at 1208 Graedon Drive, Raleigh, NC with the intent to fraudulently convert the property to his own, when in fact the defendant knew that his actions to convert the property to his own were

> fraudulent. This act was done in violation of [N.C. Gen. Stat. § 14-100].

As Defendant notes, the false pretenses indictment does not explicitly charge Defendant with having made any particular false representation.

This Court has previously upheld the sufficiency of an indictment charging the defendant with obtaining property by false pretenses which, while failing to explicitly state the false representation that the defendant allegedly made, did sufficiently apprise the defendant about the nature of the false representation that he allegedly made.[2] In *State v. Perkins*, 181 N.C. App. 209, 638 S.E.2d 591 (2007), the indictment alleged, in part, that "THIS PROPERTY WAS OBTAINED BY MEANS OF USING THE CREDIT CARD AND CKECK [sic] CARD OF MIRIELLE CLOUGH WHEN IN FACT THE DEFENDANT WRONGFULLY OBTAINED THE CARDS AND WAS NEVER GIVEN PERMISSION TO USE THEM." *Id.* at 215, 638 S.E.2d at 595. In upholding the sufficiency of this allegation, we stated that, "[b]y alleging that defendant used a card that was issued in the

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[2]Although our dissenting colleague emphasizes the allegations concerning Defendant's acts contained in the indictment, the actual requirement set forth in our prior decisions is that "the indictment must state the alleged false representation." *Braswell*, __ N.C. App. at __, 738 S.E.2d at 233. Thus, we believe that the important portion of our decision in *Perkins* is the holding that a sufficient allegation that the defendant in a false pretenses case made the required false representation can be inferred from the language of the indictment even if it is not directly stated.

name of another person, that was wrongfully obtained, and that she had no permission to use, the indictment sufficiently apprised defendant that she was accused of falsely representing herself as an authorized user of the cards." *Id.*

A careful study of the record reveals that the false pretenses indictment returned against Defendant in this case sufficiently apprised Defendant that he had been accused of falsely representing that he owned the Graedon Drive property as part of an attempt to fraudulently obtain ownership or possession **of** it.[3] More specifically, the false pretenses indictment returned against Defendant alleges that he wrongfully obtained the Graedon Drive property by "mov[ing] into the house . . . with the intent to fraudulently convert the property to his own." The act of moving into a residence or occupying a particular tract of property is, under ordinary circumstances, tantamount to an assertion that the person owns or is lawfully entitled to occupy the premises. However, that implied assertion becomes fraudulent in nature in the event that the person who moves into the home or occupies the property while taking steps to falsely effectuate his claim of ownership or

[3]According to the record, Defendant made this representation in a number of ways, including his reliance upon false documents in his discussions with investigating officers.

possession knows that he is not lawfully entitled to do so.[4] As a result, since the indictment sufficiently alleges that Defendant obtained the Gradeon Drive property by falsely representing that he was lawfully entitled to occupy it, the indictment alleges more than mere entry into a building, so that

[4]According to our dissenting colleague, a decision to uphold the validity of the indictment at issue in this case would suffice to render anyone committing a theft or trespass guilty of obtaining property by false pretenses. The difference between a theft or trespass and a false pretense is, however, that the latter, but not the former, involves a false representation. *State v. Hines*, 36 N.C. App. 33, 42, 243 S.E.2d 782, 787 (stating that "the essence of the crime is the intentional false pretense") (citation omitted), *disc. review denied*, 295 N.C. 262, 245 S.E.2d 779 (1978); *State v. Cummings*, 346 N.C. 291, 326, 488 S.E.2d 550, 571 (1997) (stating that a larceny conviction requires "'proof that defendant (a) took the property of another; (b) carried it away; (c) without the owner's consent; and (d) with the intent to deprive the owner of his property permanently'") (quoting *State v. White*, 332 N.C. 506, 518, 369 S.E.2d 813, 819 (1988)), *cert. denied*, 522 U.S. 1092, 118 S. Ct. 886, 139 L. Ed. 2d 873 (1998)); *Singleton v. Haywood Elec. Membership Corp.*, 357 N.C. 623, 627, 588 S.E.2d 871, 874 (2003) (stating that "[i]t is 'elementary that trespass is a wrongful invasion of the possession of another'") (quoting *State ex rel. Bruton v. Flying "W" Enterprises, Inc.*, 273 N.C. 399, 415, 160 S.E.2d 482, 493 (1968)). Although we might agree with our dissenting colleague's argument, assuming that the taking of property like that at issue here could support a larceny conviction, *State v. Wilfong*, 101 N.C. App. 221, 222, 398 S.E.2d 668, 669 (1990) (noting that "[t]here must be a taking and carrying away of the personal property of another to complete the crime of larceny") (citation omitted), in the event that the indictment simply alleged the taking of or entry onto the property of another, the present indictment alleges both a taking or entry and the existence of an intent to defraud of the type commonly characteristic of the crime of obtaining property by false pretense. As a result, the indictment at issue here does more than allege a mere taking of or entry onto the property of another.

Defendant's contention that the indictment fails to allege that he made a specific false representation lacks merit.

b. Causal Connection

In addition, Defendant argues that the false pretenses indictment that was returned against him failed to allege the existence of a causal connection between any false representation by Defendant and the attempt to obtain property. Once again, we do not find Defendant's challenge to the validity of the false pretenses indictment persuasive.

As Defendant asserts, a valid false pretenses indictment must allege sufficient facts to show the existence of a causal connection between the false representation and the defendant's ability to obtain or the defendant's attempt to obtain property from another. *Cronin*, 299 N.C. at 236, 262 S.E.2d at 282 (1980). On the other hand, "it [is] not necessary to allege specifically that the victim was in fact deceived by the false pretense when the facts alleged in the bill of indictment are sufficient to suggest that the surrender of something of value was the natural and probable result of the false pretense." *Id.* at 237, 262 S.E.2d at 282 (citing *State v. Hinson*, 17 N.C. App. 25, 27, 193 S.E.2d 415, 416 (1972)), *cert. denied*, 282 N.C. 583, 194 S.E.2d 151, *cert. denied*, 412 U.S. 931, 93 S. Ct. 2762, 37 L. Ed. 2d 159 (1973)). In addition, this Court has stated that

"no particular form of allegation is required; an allegation that the money or property was obtained 'by means of a false pretense' is sufficient to allege the causal connection where the facts alleged are adequate to make clear that the delivery of the property was the result of the false representation." *State v. Childers*, 80 N.C. App. 236, 241, 341 S.E.2d 760, 763 (quoting *State v. Dale*, 218 N.C. 625, 12 S.E.2d 556 (1940)), *disc. review denied*, 317 N.C. 337, 346 S.E.2d 142 (1986).

In this case, the false pretenses indictment alleged that the Defendant "did knowingly and designedly with the intent to cheat and defraud, obtain [the Graedon Drive property] . . . by means of a false pretense which was calculated to deceive and did deceive." The facts alleged in the indictment are "sufficient to imply causation, since they are obviously calculated to produce the result" sought to be achieved, *Hinson*, 17 N.C. App. at 27, 193 S.E.2d at 416, given that Defendant's conduct in moving into the Graedon Drive home and falsely representing to own or be entitled to possess the property made it likely that Defendant would be allowed to occupy and, possibly, even obtain title to the property. As a result, neither of Defendant's challenges to the false pretenses indictment have merit.

B. Sufficiency of the Evidence of False Pretenses

Secondly, Defendant contends that the trial court erred by denying his motion to dismiss the false pretenses charge for insufficiency of the evidence. More specifically, Defendant contends that the undisputed evidence shows that he honestly, albeit mistakenly, believed that he could obtain title to the Graedon Drive property by adverse possession and that such a showing precluded the jury from convicting him of obtaining property by false pretenses. We do not find Defendant's contention persuasive.

An appeal from the denial of a motion to dismiss based upon the insufficiency of the evidence presents a question of law concerning whether the record contains substantial evidence of each essential element of the offense charged, or a lesser included offense, and of defendant's being the perpetrator of the offense, *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982), with "substantial evidence" being "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 66, 296 S.E.2d at 652 (citing *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). In examining the sufficiency of the record to support a conviction, the evidence must be viewed in the light most favorable to the State. *Id.* at 67, 296 S.E.2d at 652. "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." *Biber*, 365 N.C. at 168, 712 S.E.2d at 878 (quotation marks and citations omitted).

As Defendant appears to acknowledge, adverse possession has not been recognized as an affirmative defense to a criminal charge in this jurisdiction. Although a person who is able to establish the elements of adverse possession does, in fact, become the owner of the relevant tract of property, nothing of which we are aware in any way insulates the person attempting to adversely possess a tract of property from the consequences of his otherwise unlawful conduct, including criminal prosecution for obtaining property by false pretenses. The ultimate thrust of Defendant's challenge to the sufficiency of the evidence to support his false pretenses conviction is, purely and simply, an assertion that anyone who attempts to adversely possess a tract of property does not possess the intent necessary for a finding of guilt, a position that is tantamount to making an intention to adversely possess a tract of property an affirmative defense to a false pretenses charge. As a result of the fact that no such defense has previously been recognized in this jurisdiction and the fact that recognizing such a defense would have

significant public policy implications,[5] we believe that any decision to recognize an attempt to adversely possess a tract of property as a defense to a false pretenses charge should be made by the General Assembly rather than by this Court. As a result, we conclude, contrary to Defendant's contention, that the mere fact that Defendant attempted to adversely possess the Graedon Drive property does not insulate him from criminal liability in the event that the evidence otherwise shows his guilt of obtaining property by false pretenses.

A careful examination of the record provides ample justification for the jury's decision to convict Defendant of obtaining property by false pretenses. Defendant clearly intended to occupy and, eventually, own the Gradeon Drive property. In order to achieve that end, Defendant moved into and occupied the Graedon Drive property which, as we have already noted, constituted an implicit false representation to the effect that Defendant had a valid claim to the property. In addition, the record shows that Defendant falsely stated to Mr. St. Peter that he had "bought [the property] directly from the

[5]In denying Defendant's dismissal motion, the trial court stated, among other things, that "what you're suggesting is and what you have suggested through the evidence is using adverse possession, a criminal Defendant can go downstairs to the Register of Deeds, file some phony document, go to my house, walk through the front door, camp out, set up shop, do whatever you want to do, change the locks; and when I walk in, they go, It's mine; I'm taking this property by adverse possession."

bank through an investment company" and that his right to possess the property was evidenced by certain documents that he tendered to Mr. St. Peter. Furthermore, Defendant filed a fraudulent deed in the Wake County registry purporting to transfer title to the Gradeon Drive property to ONCE. In addition to showing that Defendant made multiple representations intended to further his plan to occupy and obtain title to the Gradeon Drive property, the knowing falsity of these representations shows that Defendant made them with an intent to deceive. Finally, given that the evidence suffices to demonstrate that the victim relied on the false representation in the event that the victim suspected that the representation was false, *see State v. Simpson*, 159 N.C. App. 435, 439, 583 S.E.2d 714, 716-17, *aff'd*, 357 N.C. 652, 588 S.E.2d 466 (2003) (holding that when the victim, a pawn shop owner, testified that he was suspicious that certain cameras brought into the pawn shop by the defendant had been stolen, the jury could reasonably conclude that the victim had, in fact, been deceived), the fact that Mr. St. Peter called Mr. Sanders to see if Defendant did, in fact, have the right to occupy the Graedon Drive property on the theory that, "[h]ypothetically, it could have occurred," sufficed to demonstrate that Mr. St. Peter was, in fact, deceived by Defendant's representations. As a result, the

record contained ample support for the jury's decision to convict Defendant of obtaining property by false pretenses.

C. Sufficiency of the Evidence of Breaking or Entering

Thirdly, Defendant argues that the trial court erred by denying his motion to dismiss the felonious breaking or entering charge for insufficiency of the evidence. More specifically, Defendant argues that the undisputed record evidence failed to show that he intended to commit a felony or any larceny at the time that he entered the Graedon Drive residence. Defendant is not entitled to any relief on appeal based upon this argument.

As we have already noted, the trial court arrested judgment in the case in which Defendant was convicted of felonious breaking or entering. A decision to arrest judgment can have one of two effects, with the first being to vacate the underlying judgment and the second being to withhold the entry of judgment based on a valid jury verdict. *State v. Reeves*, 218 N.C. App. 570, 575, 721 S.E.2d 317, 321 (2012) (citing *State v. Pakulski*, 326 N.C. 434, 439, 390 S.E.2d 129, 132 (1990)). Judgment is arrested in the first of these two instances "because of a fatal flaw which appears on the face of the record, such as a substantive error on the indictment," with the effect of a decision to arrest judgment in this instance being to vacate the defendant's conviction and preclude the entry of a

final judgment which is subject to review on appeal. *Id.* at 575-76, 721 S.E.2d at 321-22 (citations omitted). On the other hand, judgment is arrested in the second of these two instances for the purpose of addressing double jeopardy or other concerns, such as a situation in which the defendant has been convicted of committing a predicate felony in a case in which he or she has also been convicted of first degree murder on the basis of the felony murder rule, *see Pakulski*, 326 N.C. at 441, 390 S.E.2d at 133 (stating that the trial court properly arrested judgment with respect to "the offenses of armed robbery and felonious breaking or entering, as these offenses formed the offenses upon which the convictions of felony murder were predicated") (quotation marks and citation omitted), or convicted of a charge used to enhance punishment for a related offense. *See Reeves*, 218 N.C. App. at 576, 721 S.E.2d at 322 (finding that "the additional conviction of reckless driving was arrested because it was used to enhance the DWI") (internal quotation marks omitted). In the second of these two situations, the underlying guilty verdict remains intact so that judgment can be entered based on that verdict in the event that (1) the conviction for the murder or related charge is overturned in subsequent proceedings and (2) the verdict with respect to which judgment has been arrested is not disturbed on appeal. *Pakulski*, 326

N.C. at 439-40, 390 S.E.2d at 132 (stating that "the guilty verdicts on the underlying felonies remain on the docket and judgment can be entered if the conviction for the murder is later reversed on appeal, and the convictions on the predicate felonies are not disturbed on appeal"). In the event that the trial court arrests judgment for the first of these two reasons, we lack the authority to review any challenge that Defendant might seek to lodge against the underlying conviction on appeal given that the underlying conviction has been vacated. *Reeves*, 218 N.C. App. at 576, 721 S.E.2d at 322 (stating that a trial court's decision to arrest judgment based on a defective indictment or fatal defect on the face of the record, which has the effect of vacating the defendant's conviction on that charge, does not result in the entry of final judgment that is subject to appellate review). As a result, our initial task in reviewing Defendant's challenge to his conviction for felonious breaking or entering is to determine the basis for the trial court's decision to arrest judgment in that case.

A careful examination of the record developed at Defendant's trial indicates that the trial court did not explain the reasoning underlying its decision to arrest judgment in the breaking or entering case. In such circumstances, this Court and the Supreme Court have provided us with guidance in

determining into which of the two categories delineated above a particular decision to arrest judgment should be placed. Although "[t]he legal effect of arrest of judgment is to vacate the verdict and judgment," *State v. Morrow*, 31 N.C. App. 592, 593, 230 S.E.2d 182, 183 (1976) (citing *State v. Covington*, 267 N.C. 292, 296, 148 S.E.2d 138, 142 (1966)); *see also State v. Goforth*, 65 N.C. App. 302, 306, 309 S.E.2d 488, 492 (1983) (stating that "[t]he legal effect of arresting judgment is to vacate the verdict and sentence," so that "[t]he State may proceed against the defendant if it so desires, upon new and sufficient bills of indictment") (citing *State v. Benton*, 275 N.C. 378, 382, 167 S.E.2d 775, 778 (1969)), a limited exception to this general rule precludes the State from obtaining and proceeding upon a new charge in the event that the trial court arrests judgment with respect to a particular conviction based upon double jeopardy-related concerns. *See State v. Pagon*, 64 N.C. App. 295, 299, 307 S.E.2d 381, 384 (1983) (stating the principle that, "[i]n cases in which a defendant is convicted of two offenses in violation of the double jeopardy bar, judgment must be arrested upon one of the convictions"), *overruled on other grounds in State v. Hurst*, 320 N.C. 589, 591, 359 S.E.2d 776, 777 (1987), *overruled on other grounds in State v. White*, 322 N.C. 506, 518, 369 S.E.2d 813, 819 (1988); *Pakulski*, 326

N.C. at 439-40, 390 S.E.2d at 132 (noting the general rule that an arrest of judgment vacates the verdict while recognizing the exception for arrests of judgment necessary "to avoid a double jeopardy problem"). In the event that a trial court arrests judgment without stating an express purpose for having done so, the arrested judgment will operate to vacate the defendant's conviction with respect to that charge. *See State v. Stafford*, 45 N.C. App. 297, 300, 262 S.E.2d 695, 697 (1980) (stating that, "[g]enerally, a judgment is arrested because of insufficiency in the indictment or some fatal defect appearing on the face of the record" and assuming that judgment was arrested on those grounds given that "no reason for the arrest of judgment appear[ed] in the record on appeal").[6] As a result, in the absence of some indication that the trial court's decision to arrest judgment stemmed from double jeopardy-related concerns, the effect of the decision to arrest judgment is to vacate the underlying conviction and preclude subsequent appellate review.

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[6]Similarly, in *State v. Casey*, 195 N.C. App. 460, 673 S.E.2d 168, 2009 N.C. App. LEXIS 144 (unpublished), *disc. review denied*, 363 N.C. 584, 682 S.E.2d 704 (2009), we treated the trial court's decision to arrest judgment as resulting from a flaw appearing on the face of the record given that the trial court provided no explanation for its decision. *Casey*, 2009 N.C. App. LEXIS 144 at *14. Although *Casey*, as an unpublished decision, is not binding on this Court, the result reached in that decision is consistent with the analysis that we have utilized in addressing Defendant's challenge to this felonious breaking or entering conviction.

After carefully reviewing the record, we see no indication that the trial court's decision to vacate the judgment in the felonious breaking or entering case rested upon double jeopardy-related considerations. The felonious breaking or entering for which Defendant was convicted was simply not a predicate or basis for Defendant's false pretenses conviction. Thus, given that the trial court did not explain its decision to arrest judgment in the case in which Defendant was convicted of felonious breaking or entering and given that judgment does not appear to have been arrested in that case to avoid double jeopardy-related concerns, the trial court's decision to arrest judgment has the effect of vacating Defendant's felonious breaking or entering conviction and deprives us of the ability to review Defendant's challenge to his felonious breaking or entering conviction on the merits. As a result, Defendant is not entitled to any relief from his felonious breaking or entering conviction on the basis of the argument advanced in his brief.

D. Jury Instructions

Finally, Defendant contends that the trial court erred by refusing to instruct the jury in accordance with his written request for instructions, by instructing the jury that ignorance of the law or mistake of law were not defenses to the crime of

obtaining property by false pretenses, and by instructing the jury concerning the issue of his guilt of obtaining property by false pretenses in such a way as to shift the burden of proof with respect to the issue away from the State and onto himself. Defendant is not entitled to relief from the trial court's judgment based upon these instruction-related arguments.

1. Adverse Possession and Mistake of Law

In his first challenge to the trial court's instructions, Defendant contends that the trial court erred by refusing to instruct the jury that the State was required to prove beyond a reasonable doubt that Defendant did not intend to gain ownership of property by adverse possession and by instructing the jury, instead, about the elements of adverse possession accompanied by an instruction that ignorance or a mistake of law did not operate to excuse unlawful conduct. More specifically, Defendant argues that, in the event that the jury concluded that he intended to adversely possess the Graedon Drive property, then he lacked the intent to deceive necessary for guilt of obtaining property by false pretenses and that the trial court erred by failing to instruct the jury to that effect. We do not find Defendant's argument persuasive.

At trial, Defendant requested the trial court to instruct the jury that the State bore the burden of proving beyond a

reasonable doubt that he was not seeking to adversely possess the Graedon Drive property.[7] Although the trial court declined to instruct the jury in accordance with Defendant's request, it did discuss the law of adverse possession while coupling this instruction with the statement that "[i]gnorance or mistake of law will not excuse an act in violation of the criminal laws."

A trial court's jury instructions are sufficient if they present the law of the case in such a manner as to leave no reasonable cause for believing that the jury was misled or misinformed. *State v. Blizzard*, 169 N.C. App. 285, 296-97, 610 S.E.2d 245, 253 (2005). "A charge must be construed contextually, and isolated portions of it will not be held prejudicial when the charge as a whole is correct." *State v. Chandler*, 342 N.C. 742, 751-52, 467 S.E.2d 636, 641 (citations omitted), *cert. denied*, 519 U.S. 875, 117 S. Ct. 196, 126 L. Ed. 2d 133 (1996). "[W]hen a defendant requests an instruction which is supported by the evidence and is a correct statement of the law, the trial court must give the instruction, at least in

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[7]In his request, Defendant asked the trial court to instruct the jury that, "[w]hen evidence has been offered that tends to show that the alleged offenses were in an attempt to adversely possess property and you find that the defendant was in fact attempting to adversely possess property, the defendant would not be guilty of any crime," with "[t]he burden [being] on the [S]tate to prove its case beyond a reasonable doubt and in so doing disprove the defendant's assertion of attempting to adversely possess the property."

substance." *State v. Garner*, 340 N.C. 573, 594, 459 S.E.2d 718, 729 (1995), *cert. denied*, 516 U.S. 1129, 116 S. Ct. 948, 133 L. Ed. 2d 872 (1996). "[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "[A] trial court's failure to submit a requested instruction to the jury is harmless unless defendant can show he was prejudiced thereby." *State v. Muhammad*, 186 N.C. App. 355, 361, 651 S.E.2d 569, 574 (2007), *appeal dismissed*, 362 N.C. 242, 660 S.E.2d 537 (2008).

As we have previously determined, an intent to adversely possess a tract of property is not a recognized defense to a criminal act in North Carolina. For that reason, the law of adverse possession does not, contrary to Defendant's contention, have any bearing on the issue of Defendant's guilt of obtaining property by false pretenses. For that reason, the trial court did not err by failing to instruct the jury that the State was required to prove that Defendant did not intend to adversely possess the Graedon Drive property beyond a reasonable doubt in order to return a verdict of guilty or by instructing the jury that ignorance of the law or a mistake of law would not serve to obviate Defendant's guilt of that offense. As a result,

Defendant is not entitled to relief from the trial court's judgment on the basis of this contention.

2. Intent-Related Burden of Proof

Secondly, Defendant contends that the trial court impermissibly shifted the burden of proving that he lacked the intent necessary for guilt of the offense of obtaining property by false pretenses from the State to himself. Once again, we do not find Defendant's argument persuasive.

The trial court instructed the jury with respect to the issue of Defendant's guilt of obtaining property by false pretenses in a manner consistent with the Supreme Court's decision in *Cronin* and the North Carolina Pattern Jury Instructions as follows:

> The Defendant has been charged with obtaining property worth -- obtaining property worth more than $100,000 by -- or more by false pretenses. For you to find the Defendant guilty of this offense, the State must prove six things beyond a reasonable doubt.
>
> First, that the Defendant made a representation to another.
>
> Second, that this representation was false.
>
> Third, that the representation was calculated and intended to deceive.
>
> Fourth, that the victim was, in fact, deceived by this representation.

Fifth, that the Defendant thereby obtained or attempted to obtain property from the victim.

And, sixth, that the property was worth $100,000 or more.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date that the Defendant made a representation and that this representation was false, that this representation -- representation was calculated and intended to deceive, that the victim was, in fact, deceived by it, that the defendant thereby attempted or -- excuse me -- the - the defendant thereby obtained or attempted to obtain property from the victim and that the property was worth $100,000 or more, it would be your duty to return a verdict of guilty of obtaining property worth $100,000 or more by false pretenses.

If you do not so find or if you have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of obtaining property worth $100,000 or more by false pretenses, but you must determine whether he is guilty of obtaining property by false pretenses.

Obtaining property by false pretenses differs from obtaining property worth $100,000 or more by false pretenses in that the value of the property need not be worth $100,000 or more.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date that the defendant made a representation, that this representation was false, that this representation was calculated and intended to deceive, that the victim was, in fact, deceived by it, and the defendant thereby obtained or attempted to obtain property from the victim, it would be

> your duty to return a verdict of guilty of obtaining property by false pretenses.
>
> If you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

See N.C.P.I.-Crim. 219.10A; *Cronin*, 299 N.C. at 242, 262 S.E.2d at 286. As we understand them, the trial court's instructions clearly placed the burden of proving that Defendant acted with the necessary intent to deceive upon the State. Although Defendant asserts that the trial court's decision to instruct the jury that ignorance and mistake of law did not excuse otherwise criminal conduct had the effect of shifting the burden of proof with respect to the intent issue, a decision to accept that argument would require us to also accept Defendant's contention that an intent to adversely possess property operates to preclude a conviction for obtaining property by false pretenses, a step that we have declined to take. With that exception, Defendant has failed to identify any language in the trial court's jury instructions that had the effect of shifting the burden of proof with respect to the intent issue from the State to Defendant, and nothing that has that effect is apparent to us based on our review of the trial court's instructions. As a result, Defendant is not entitled to relief from the trial court's judgment on the basis of this argument.

III. Conclusion

Thus, for the reasons set forth above, we conclude that none of Defendant's challenges to the trial court's judgments have merit. As a result, the trial court's judgments should, and hereby do, remain undisturbed.

AFFIRMED.

Judge McCULLOUGH concurs.

Judge DILLON concurs in part and dissents in part in separate opinion.

NO. COA14-39

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

STATE OF NORTH CAROLINA

v. Wake County
No. 11 CRS 218528

SWAWN A. PENDERGRAFT

DILLON, Judge, concurring in part and dissenting in part.

I concur with the majority's holding with respect to Defendant's challenge to the felonious breaking or entering judgment. However, I respectfully dissent from the holding finding no error in Defendant's conviction for obtaining property by false pretenses. Specifically, I believe that the indictment is fatally defective because it fails to allege any false representation, an essential element of that crime.[8] *State v. Braswell*, ___ N.C. App. ___, ___, 738 S.E.2d 229, 233 (2013) (holding that "the indictment must state the alleged false representation").

The only action by Defendant alleged in the indictment is that he "moved into the house[.]" Otherwise, the indictment

[8] As described by our Supreme Court, "[t]he gist of obtaining property by false pretenses is the false representation of a subsisting fact [or future event] intended to and which does deceive one from whom the property is obtained." *State v. Linker*, 309 N.C. 612, 614-15, 308 S.E.2d 309, 310-11 (1983).

alleges his *intent* "to fraudulently convert the property to his own[,]" this intent being a separate element which also must be alleged. *State v. Moore*, 38 N.C. App. 239, 241, 247 S.E.2d 670, 672, *disc. review denied*, 295 N.C. 736, 248 S.E.2d 866 (1978) (holding an indictment to be fatally defective which fails to allege that the defendant acted with "the intent to defraud"). However, the only action alleged in the indictment - that Defendant moved into the house - is essentially just another way of stating that he "obtained" the property. The allegation does not identify "the false representation" *used* to obtain the property. If obtaining property were equivalent to obtaining that property by means of a false pretense, *every* larceny would constitute obtaining property by false pretenses.[9]

The majority cites *State v. Perkins*, 181 N.C. App. 209, 638 S.E.2d 591 (2007), for the proposition that the required false

[9] Though "trespass" is typically a word used to describe the unlawful possession of real property, our Supreme Court has described larceny - the unlawful taking of personal property - as a type of "trespass." *State v. Bowers*, 273 N.C. 652, 655, 161 S.E.2d 11, 14 (1968). In *Bowers*, the Court stated that this type of trespass can be either "actual" or "constructive." *Id.* "Actual" trespass occurs where the taking does not involve "some trick or artifice," whereas "constructive" trespass occurs where the taking involves deceit. *Id.* In the present case, the indictment only alleges actions akin to an "actual" trespass – Defendant moved into and physically possessed the house – and no deceit or falsehood.

representation can be inferred from the *actions* alleged in an indictment. I agree with this general proposition. However, the action alleged in the present indictment falls far short of the language approved by this Court in *Perkins*.

The indictment in *Perkins* alleged that the defendant's actions consisted of obtaining "beer and cigarettes" *by purchasing them with a stolen credit card*. *Id.* at 215, 638 S.E.2d at 595. On appeal, we held that though the indictment did not allege that the defendant made an explicit statement, it "adequately described [her] actions" to "apprise[] [her] that she was [being] accused of falsely representing herself as an authorized user of the [stolen] cards." *Id.* at 215, 638 S.E.2d at 595-96. In reaching this conclusion, we cited our Supreme Court's holding in *State v. Parker*, 354 N.C. 268, 553 S.E.2d 885 (2001), that a "false pretense need not come through spoken words, but instead may be by act or conduct." *Id.* at 215, 638 S.E.2d at 595.

Unlike the actions alleged in *Perkins*, no intent that Defendant obtained possession of the house by means of a false representation is readily inferable from the action alleged here – that Defendant "moved into the house." I do not believe the General Assembly intended that a defendant who unlawfully

obtains property *by whatever means* would be criminally liable under G.S. 14-100 for *ob*taining that property by false pretenses simply based on an allegation that he took or *re*tained possession of it, which is what was alleged here. Neither party nor the majority cite – nor has my research uncovered – any case where G.S. 14-100 has been applied to a defendant who merely continues to trespass on land or continues to possess and use stolen property, where the property was not otherwise obtained by means of a false pretense. *Perkins*, on the other hand, involved a somewhat routine application of G.S. 14-100, clearly intended by the General Assembly, whereby a defendant *ob*tained the possession of property (beer and cigarettes) *from someone else* by deceit. The present case would be more analogous to *Perkins* if there had been an allegation in the indictment that Defendant obtained possession of the house through some deceit rather than by simply moving in or if Defendant had obtained *some other property*, such as *rent money* from a prospective tenant, by falsely representing himself as the owner of the house.

The State advanced an alternate theory at trial that – rather than the property being *the house itself* which Defendant "obtained" by moving in, as alleged in the indictment - the

property involved was *the continued possession of* or *the clear title to the house* that Defendant was "attempting to obtain." However, even based on this alternate theory, the mere allegation in the indictment that he moved into the house still fails to identify any false representation by which he attempted to obtain this property.

In any event, I do not believe that the General Assembly intended that a defendant becomes criminally liable under G.S. 14-100 based on the mere continuing trespass to property that he wrongfully obtained by whatever means, even where his intent was – to use the words of the indictment – "to convert the property to his own," whether temporarily or permanently, based on an adverse possession/statute of limitations defense. *See, e.g.*, N.C. Gen. Stat. § 1-52(4) (2013) (three-year statute of limitation to bring an action to recover property wrongfully converted). To be sure, the intent of many who criminally trespass on real property or steal personal property is to convert the property to their own, even if only for a short time. However, having this intent does not elevate the mere trespass to a crime of obtaining property by false pretenses. Otherwise, everyone who trespassed on land, for no matter how long, would be criminally liable for violating G.S. 14-100.

Similarly, a defendant caught driving a stolen car would also be subject to criminal liability under the statute based on an indictment which alleged that the defendant "drove the car with the fraudulent intent of converting the car to his own use," based on a theory that "the property" was *not* the car itself *but rather* the temporary or permanent continued use of the car, and "the false representation" was that the defendant claimed ownership to the car, which could be inferred merely from his act of driving it. Thus, while Defendant's actions alleged in the indictment are sufficient to allege a criminal act, I do not believe they allege the crime of obtaining property by false pretenses.