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NO. COA08-447

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2008

STATE OF NORTH CAROLINA,
Plaintiff,

v.

CHARLIE O'NEAL INGRAM, JR.
Defendant.

Nash County
No. 06CRS050724
06CRS050725
06CRS050726

Court of Appeals

Appeal by defendant from judgments entered on or about 26 November 2007 by Judge Milton F. Fitch, Jr. in Superior Court, Nash County. Heard in the Court of Appeals 24 September 2008.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Donna B. Wojcik for the State.

Slip Opinion

Daniel F. Read, for defendant-appellant.

STROUD, Judge.

Defendant was convicted of three counts of obtaining property by false pretenses. On appeal, defendant argues that the trial court erred in (1) denying defendant's motions to dismiss due to insufficient evidence and (2) trying and sentencing defendant on three separate counts as the evidence only disclosed one false representation. For the following reasons, we find no error.

I. Background

Blanch Haney¹ ("Ms. Haney") "answered an ad in the paper for a house to rent with option to buy." In the fall of 2005, Ms. Haney met with defendant at the property and decided to purchase it. Ms. Haney, her grandson, and defendant signed a contract for the purchase of the property at 7062 Driver Road, Zebulon, North Carolina for a purchase price of \$90,000.00, with payment of \$2,100 in earnest money. Ms. Haney and her grandson gave defendant \$100.00 cash and a \$2,000 check. Defendant allowed Ms. Haney and her grandson to move into the house prior to completion of the purchase. Ms. Haney later gave defendant \$8,100 in a cashier's check "for the rest of the deposit on the house." In December, defendant "finally admitted that he was not eligible to sell . . . the house." Ms. Haney never received back the money she had given defendant. In February, defendant signed an unconditional guarantee agreement that he would pay Ms. Haney \$10,704.69 by 30 May 2006. On 24 April 2006, Ms. Haney was evicted from the property.

On or about 16 October 2006, defendant was indicted for three counts of obtaining property by false pretenses. On or about 14 August 2007, defendant was found guilty of all three counts. The trial court filed three separate judgments consecutively sentencing defendant to a minimum term of 10 months and a maximum term of 12 months imprisonment for each count of obtaining property by false

¹ We note that both parties' briefs spell the victim's name as "Blanche Haynie"; however, we are bound by the record before us, and thus we will use the spelling in the transcript, "Blanch Haney."

pretenses. Defendant appeals. The issues before this Court are whether the trial court erred in (1) denying defendant's motions to dismiss due to insufficient evidence and (2) trying and sentencing defendant on three separate counts as the evidence only disclosed one false representation. For the following reasons, we find no error.

II. Motions to Dismiss

Defendant first contends that "the trial court erred in denying the defendant's motions to dismiss, as the evidence was insufficient to submit the charges to the jury"

Upon defendant's motion for dismissal, the question for the court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied. The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

State v. Estes, ___ N.C. App. ___, ___, 651 S.E.2d 598, 601-02 (2007) (citation and ellipses omitted), *appeal dismissed and disc. review denied*, 362 N.C. 365, 661 S.E.2d 883 (2008).

N.C. Gen. Stat. § 14-100(a) reads,

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, goods, property, services, chose in action, or other thing of value with intent to cheat or defraud any person of such money, goods, property, services, chose in action or other thing of value, such person shall be guilty of a felony

N.C. Gen. Stat. § 14-100(a) (2005).

Our Supreme Court has enumerated the elements of obtaining property by false pretenses: (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. McBride, ___ N.C. App. ___, ___, 653 S.E.2d 218, 221 (2007) (citation and quotation marks omitted).

Here the State presented evidence that defendant (1) falsely represented to Ms. Haney that he had the authority to sell the property, (2) intended to deceive Ms. Haney into believing he did have the authority to sell the property in order to obtain money from her, (3) did in fact deceive Ms. Haney as she gave defendant a total of \$10,200 under the belief that she was purchasing the property, and (4) obtained \$10,200 from Ms. Haney due to her false belief that she was purchasing property which defendant had the authority to sell. See *McBride* at ___, 653 S.E.2d at 221.

Defendant essentially contends the State's evidence was insufficient because the contract expressly stated he "may not own the property[,]" so there is no evidence defendant did not have the authority to sell the property at the time he represented he did have the authority, and there is no evidence defendant did not have an option to purchase the property. However, these contentions are

without merit. When we view the evidence "in the light most favorable to the State[,]” *Estes* at ___, 651 S.E.2d at 602, it tends to show defendant falsely represented to Ms. Haney that he was authorized to sell the property when in fact he never had such authority. This argument is overruled.

III. Three Counts of Obtaining Property by False Pretenses

Defendant next argues “[o]nly a single false representation was alleged, that . . . [defendant] did not have authority to sell the land. . . . [T]here was therefore only one criminal transaction.”

However, pursuant to North Carolina Rule of Appellate Procedure 10(b)(1), “In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.” N.C.R. App. P. 10(b)(1). Furthermore, our Supreme Court has determined,

We have stressed that Rule 10(b)(1) is not simply a technical rule of procedure but shelters the trial judge from an undue if not impossible burden.

In light of the practical considerations promoted by the waiver rule, a party’s failure to properly preserve an issue for appellate review ordinarily justifies the appellate court’s refusal to consider the issue on appeal.

Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., 362 N.C. 191, 195-96, 657 S.E.2d 361, 363-64 (2008) (citations and quotation marks omitted).

Here defendant failed to request the trial court dismiss the multiple indictments or any of the counts at trial on the grounds that there was only one false representation and thus only one crime committed. As we do not find this case to have "exceptional circumstances" under which we would choose to hear this argument pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure, this argument is deemed waived. See N.C.R. App. P. 2; *Dogwood Dev. & Mgmt. Co., LLC* at 196, 657 S.E.2d at 364.

IV. Motion for Appropriate Relief

We also note that defendant has filed a motion for appropriate relief with this Court, in which he alleges ineffective assistance of counsel. Defendant claims that his trial counsel failed to subpoena documentation which clearly demonstrates that he did have authority to arrange a sale of the property to Ms. Haney. However, we are unable to determine the issue of ineffective assistance of counsel upon the motion for appropriate relief as the record before us does not contain sufficient evidence to determine this issue. See N.C.R. App. P. 9(a) ("In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, constituted in accordance with this Rule 9, and any items filed with the record on appeal pursuant to Rule 9(c) and 9(d)."); *State v. Fair*, 354 N.C. 131, 166-67, 557 S.E.2d 500, 524-25 (2001) (citations and quotation marks omitted) ("[Ineffective assistance of counsel] claims brought on direct review will be decided on the merits when the cold record reveals that no further

investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing. This rule is consistent with the general principle that, on direct appeal, the reviewing court ordinarily limits its review to material included in the record on appeal and the verbatim transcript of proceedings, if one is designated. . . . Accordingly, should the reviewing court determine that IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent [motion for appropriate relief proceeding.]), *cert. denied*, 535 U.S. 1114, 153 L.E. 2d 162 (2002). Therefore, we dismiss defendant's ineffective assistance of counsel claim "without prejudice to the defendant's right to reassert [it] during a subsequent [motion for appropriate relief] proceeding." See *Fair* at 167, 557 S.E.2d at 525.

IV. Conclusion

We conclude that the trial court did not err in denying defendant's motions to dismiss and that defendant has waived his second argument on appeal. We also dismiss defendant's motion for appropriate relief without prejudice.

NO ERROR.

Judges STEELMAN and JACKSON concur.

Report per Rule 30(e).