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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-117

Filed: 18 December 2018

Onslow County, No. 16 CRS 52399

STATE OF NORTH CAROLINA

v.

LUDLOW RAY DAW, JR., Defendant.

Appeal by Defendant from Judgment entered 6 July 2017 by Judge Charles W. Gilchrist in Onslow County Superior Court. Heard in the Court of Appeals 6 September 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph E. Herrin, for the State.

William D. Spence for Defendant-Appellant.

INMAN, Judge.

Ludlow Ray Daw, Jr. (“Defendant”) appeals from a judgment following a jury trial finding him guilty of obtaining property by false pretenses and conspiracy to commit obtaining property by false pretenses. Defendant contends: (1) the indictment alleging the charge of obtaining property by false pretenses was fatally defective; and (2) the trial court erred in denying Defendant’s motions to dismiss the

charges for lack of sufficient evidence. After careful review of the record and applicable law, we hold that Defendant received a fair trial, free from error.

Factual & Procedural History

The evidence at trial tended to show the following:

In 2012, Steven Everett (“Everett”) purchased a front-end loader (the “Bobcat”) for \$17,000 for his construction company in Iowa. In 2015, he moved to Sneads Fairy, North Carolina, where he worked as a carpenter at DS Painting and Construction, and became acquainted with co-worker Ed Pogorzelski (“Pogorzelski”). In October 2015, Everett left the carpentry job and became unemployed.

On 18 March 2016, Pogorzelski called Everett and informed him that he had left DS Painting and Construction and was working at Adams Concrete. He asked if Everett was willing to rent the Bobcat, explaining that his boss needed one for a job. Pogorzelski agreed to bring his boss to Everett’s house that afternoon to discuss the potential rental.

That afternoon, the men arrived at Everett’s house and Pogorzelski introduced his boss, later identified as Defendant, as Ray Patrick. Everett and Defendant shook hands, and Defendant said, “Hey, I’m Ray . . . I own Adams Concrete.” Defendant explained that his company “do[es] all sort of concrete work in the Onslow County area.” Defendant showed Everett “referrals” and Google reviews of his company on his cell phone. Everett then showed the men the Bobcat which, at the time, was stuck

in a mud hole in his back yard. Pogorzelski called a tow truck to tow the Bobcat out of the mud. The men then discussed the terms of the rental. Defendant said he only needed the Bobcat for the weekend and agreed to pay Everett \$250 cash for the rental.

The following morning, Saturday 19 March, Pogorzelski and Defendant returned to Everett's house to retrieve the Bobcat. Once again the men discussed the terms of the agreement and shook hands. Defendant gave Everett his phone number, and Everett stored the number in his cell phone as "Ray Patrick, Adams Concrete." Everett prepared a written contract, which Defendant signed. Defendant filled in the name "Ray Patrick" at the top of the contract and signed "Ray Patrick" at the bottom of the contract. The contract provided:

I, Ray Patrick, am renting a 2007 Bobcat S175 from Steve Everett, pickup date Friday p.m., 3/18. Will return Sunday, p.m., 3/20. I am responsible for securing skid loader at night and am assuming responsibility in case of theft or damage. Paid \$250 cash, up front. Paid in full.

After Defendant signed the contract and paid Everett \$250 in cash, the men loaded the Bobcat onto the trailer, chained it down, and drove away.

On Sunday afternoon—the agreed upon return date—Everett called Defendant to arrange a time for Defendant to return the Bobcat. Defendant explained that he had been unable to use the Bobcat because of inclement weather and his son's birthday party. Everett suggested that Defendant retain possession of the Bobcat for one more night—for no extra charge—and return it Monday morning.

On Monday, when the Bobcat had not been returned, Everett called Defendant several times and received no response. Over the next several days, Everett and Defendant exchanged text messages, in which Everett repeatedly demanded the return of the Bobcat and Defendant offered various excuses for not returning it. Defendant at different times blamed car trouble, police interference, and Pogorzelski, who he represented was in actual possession of the Bobcat. Defendant accused Everett and his wife of being drug addicts and accused Pogorzelski of being a thief. Everett, for his part, maintained that he would be willing to forgive all involved if they would return his Bobcat. At one point, Defendant sent Everett a photograph of what he purported was Everett's Bobcat. But Everett noticed that the machine in the photo was "nicer" and did not have the same identifiable marks as his own—*i.e.* a missing headlight and unique dent. Everett then accused Defendant of lying, and Defendant sent one final text message asking for Everett's address in order to return the Bobcat.

Everett went to the magistrate's office, and from there was directed to the Onslow County Sheriff's Office. On 29 March, Everett spoke with Detective Michael Gibbs, and provided him with screen shots of text messages he had exchanged with Defendant, as well as a copy of the signed contract. He also furnished the phone numbers he had been using to communicate with Defendant and Pogorzelski.

Detective Gibbs then accessed an internal records management system and retrieved photographs of the men associated with the phone numbers. Everett identified the first photograph as Pogorzelski, “a friend of his,” who was one of the two men who came to his house to rent the Bobcat. Everett identified the man in the second photograph as the individual who had represented himself as Ray Patrick but, based on his personal knowledge, Detective Gibbs knew the man in the photograph as Ludlow Ray Daw, Jr., Defendant. Detective Gibbs obtained arrest warrants for Pogorzelski and Ludlow Ray Daw, Jr.

Defendant was arrested. In an interview with Detective Gibbs, he acknowledged that he had been at Everett’s home with Pogorzelski, and that he had handed Everett money. He stated that Pogorzelski had incorrectly identified him as “Ray Patrick,” but explained that Ray was his middle name and Patrick was his girlfriend’s last name. He denied signing the contract or representing himself as “Ray Patrick,” but admitted to communicating with Everett, and acknowledged that the picture of the Bobcat had been sent from his cell phone. He explained that the picture was not of Everett’s Bobcat, but was one that Pogorzelski had found online. He claimed that Pogorzelski had sold the Bobcat to some unknown individuals in Morehead City.

Pogorzelski was arrested approximately one month later. Pogorzelski denied ever having sole possession of the Bobcat and estimated that Defendant was in

possession of the Bobcat for two months. He said the Bobcat was at Defendant's house for a period of time, then was transferred to Defendant's girlfriend's parents' house, where it remained broken down in the back yard. Porgorzelski said Defendant then sold the Bobcat to a couple from New Bern, who paid \$3,500 by check and \$1,000 in cash. The check was written out to Pamela Patrick.

On 15 November 2016, an indictment was issued against Defendant and on 14 February 2017, a superseding indictment was issued, alleging that Defendant obtained property by false pretenses and conspired with Pogorzelski to commit felony larceny. On 27 June 2017, the trial court allowed the State's motion to amend the heading of the indictment from conspiracy to commit felony larceny to conspiracy to obtain property by false pretenses. Defendant was also indicted as being a habitual felon in violation of N.C. Gen. Stat. § 14-7.1.

The case came to trial 3 July 2017, Judge Charles W. Gilchrist presiding. On 6 July 2017, a jury found Defendant guilty of obtaining property by false pretenses and guilty of conspiracy to commit obtaining property by false pretenses. Defendant pleaded guilty to his habitual felon status. The trial judge consolidated the charges for judgment and sentenced Defendant to a minimum of 78 months and maximum of 106 months imprisonment.

Defendant timely appealed.

Analysis

Defendant argues: (1) the indictment alleging the charge of obtaining property by false pretenses is fatally defective because it fails to show a causal connection between the false representation and Everett's rental of the Bobcat to Defendant; and (2) the trial court erred in denying Defendant's motion to dismiss the charges of obtaining property by false pretenses and conspiracy to obtain property by false pretenses. We disagree.

I. Facial Validity of the Indictment

Defendant contends that the false pretenses indictment was invalid because it failed to allege an essential element of the crime—that Everett was in fact deceived by Defendant's false representation. Specifically, Defendant argues the indictment failed to allege the existence of a causal connection between Defendant's false representation of his name and Everett's decision to rent Defendant his Bobcat.

"[W]hen an indictment is alleged to be facially invalid, thereby depriving the trial court of its jurisdiction, it may be challenged at any time, notwithstanding a defendant's failure to contest its validity in the trial court." *State v. Call*, 353 N.C. 400, 429, 545 S.E.2d 190, 208 (2001).

An indictment must contain:

[a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

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State v. Cronin, 299 N.C. 229, 234, 262 S.E.2d 277, 281 (1980) (quoting N.C. Gen. Stat. § 15A-924(a)(5) (1978)). An indictment is sufficient under the North Carolina Constitution “if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense. . . . [and] enable[s] the court to know what judgment to pronounce in the event of conviction.” *State v. Coker*, 312 N.C. 432, 434, 323 S.E.2d 343, 346 (1984) (citations omitted). “With respect to a bill of indictment for obtaining property by false pretenses, there must be allegations sufficient to state a causal connection between the alleged false representation and the obtaining of the property or money.” *State v. Childers*, 80 N.C. App. 236, 241, 341 S.E.2d 760, 763 (1986).

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. Seelig*, 226 N.C. App. 147, 152, 738 S.E.2d 427, 431 (2013) (quoting *Cronin*, 299 N.C. at 242, 262 S.E.2d at 286).

In this case, the indictment states that Defendant:

unlawfully, willfully and feloniously did knowingly and designedly, with the intent to cheat and defraud, obtain a Bobcat Model S175 “skid loader” from Stephen Everett by means of a false pretense which was calculated to deceive and did deceive. The false pretense consisted of the

following: By identifying himself as “Ray Patrick” and signing that name to a handwritten rental agreement.

This Court has squarely addressed this argument in *State v. Anthony*, 74 N.C. App. 590, 328 S.E.2d 598 (1985). There, a man referring to himself as Barry Johnson telephoned Maurice Hill Jr., an employee of School Plans, Inc. and ordered candy. *Id.* at 591, 328 S.E.2d at 599. The man provided an address for delivery and explained that his wife would receive delivery of the candy. *Id.* at 591, 328 S.E.2d at 599. When the candy was delivered, the defendant signed for the delivery under a false name, representing herself as Mrs. A. Johnson, the wife of Johnson. *Id.* at 591, 328 S.E.2d at 599. Subsequently, the defendant accepted delivery of three more orders of candy under that same false name. *Id.* at 591, 328 S.E.2d at 599. After informing the defendant on his final delivery that he could not deliver any more candy until the bills for the past deliveries were paid, Hill was unable locate the defendant or the man who had referred to himself as Barry Johnson. *Id.* at 591, 328 S.E.2d at 599.

The indictments issued against the defendant in *Anthony* alleged that “the property was obtained ‘by means of a false pretense which was calculated to deceive and did deceive’ and ‘the false pretense consisted of the following: the defendant received and accepted delivery . . . by representing herself as ‘Mrs. A. Johnson.’” *Id.* at 592, 328 S.E.2d at 599 (brackets omitted). The defendant argued that the indictments were defective because they failed to allege that the defendant’s false name deceived School Plans, Inc. or that the candy was obtained as a direct result of

the defendant's misrepresentation of her identity. *Id.* at 592, 328 S.E.2d at 599. This Court held "that these allegations sufficiently allege that the defendant's misrepresentations deceived School Plans, Inc. and the property was obtained as a result of the misrepresentation." *Id.* at 592, 328 S.E.2d at 599.

The false pretense alleged both in this case and in *Anthony* involved the use of a false name, and the indictments in both cases stated that the property was obtained "by means of a false pretense which was calculated to deceive and did deceive," mirroring the language of the obtaining property by false pretenses statute. Thus, we adopt our reasoning in *Anthony* and hold that the indictment in this case sufficiently alleged that Defendant obtained possession of the Bobcat as a result of Defendant's use of a false name. Accordingly, we reject Defendant's argument.

II. Motions to Dismiss

A. *Obtaining Property by False Pretenses*

Defendant first argues that the trial court erred in denying his motion to dismiss the charge of obtaining property by false pretenses, because the evidence was insufficient to support a jury finding that Defendant intended to deceive Everett by use of the false name or that Everett transferred possession of the Bobcat as a result of the false name. We disagree.

This Court reviews a motion to dismiss for insufficiency of the evidence *de novo*. *State v. Stephens*, 244 N.C. 380, 384, 93 S.E.2d 431, 433 (1956). A trial court properly

denies a motion to dismiss if there is substantial evidence “(1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant’s being the perpetrator of such offense.” *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). Substantial evidence can be direct or circumstantial, or both. *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (2000). However, “the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

Everett testified that in their first meeting, Defendant introduced himself as Ray, the owner of Adams Concrete. Defendant told Everett that Adams Concrete was busy and did a variety of concrete work in Onslow County. Defendant showed Everett referrals and Google reviews of the company on his cell phone. Everett testified that Defendant “made it seem legitimate enough.” This evidence, considered in a light most favorable to the State, supports a reasonable inference that by using the name Ray Patrick, Defendant was falsely representing himself as the owner of a busy concrete business, which had received positive reviews, in an attempt to induce Everett to rent him the Bobcat. This evidence is also sufficient to support a reasonable inference that Everett rented Defendant the Bobcat based on this false

representation. Thus, the trial court did not err in denying Defendant's motion to dismiss the charge of obtaining property by false pretenses.

B. Conspiracy to Obtain Property by False Pretenses

Defendant next argues that the trial court erred in denying his motion to dismiss the charge of conspiracy to obtain property by false pretenses. Specifically, Defendant argues that the State failed to offer substantial evidence that on or about 18 March or 29 March 2016, Defendant agreed with Pogorzelski to commit the crime of obtaining property by false pretenses. We disagree.

"A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act by unlawful means." *State v. Lamb*, 342 N.C. 151, 155, 463 S.E.2d 189, 191 (1995) (citation omitted). "[I]n establishing a criminal conspiracy, direct proof is not required," however, "[i]t may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *State v. Valentine*, 357 N.C. 512, 522, 591 S.E.2d 846, 855 (2003) (internal quotation marks and citation omitted).

At trial, Pogorzelski testified, without objection, that he had pleaded guilty to felony conspiracy to commit larceny in conjunction with "the Bobcat that was taken from Mr. Everett." Considered in the light most favorable to the State, Pogorzelski's testimony is sufficient evidence of a conspiracy between Defendant and Pogorzelski

to obtain the Bobcat from Everett by means of a false pretenses. Thus, the trial court did not err in denying Defendant's motion to dismiss this charge.

Conclusion

For the reasons we have explained, we hold that Defendant received a fair trial, free from error.

NO ERROR.

Judges TYSON and BERGER concur.

Report per Rule 30(e).