IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-621

Filed: 16 April 2019

Buncombe County, No. 15CRS91363-64, 15CRS92141, 15CRS93092-94, 15CRS93096, 15CRS93098-99

STATE OF NORTH CAROLINA

v.

ROBERT DEAN GADDY, JR., Defendant.

Appeal by Defendant from judgments entered 16 February 2018 by Judge J. Thomas Davis in Buncombe County Superior Court. Heard in the Court of Appeals 13 February 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Creecy C. Johnson, for the State.

Edward Eldred, Attorney at Law, PLLC, by Edward Eldred, for Defendant-Appellant.

INMAN, Judge.

When a trial court's supplemental instruction to jurors, considered in context with the entire instruction, is not inconsistent with the law regarding the element of intent necessary to find a defendant guilty of obtaining property by false pretenses

and exploiting a disabled adult, and can be read to clarify application of the law to the specific facts presented to jurors, the defendant fails to demonstrate error.

Defendant Robert Dean Gaddy, Jr. ("Defendant") appeals his convictions following jury verdicts finding him guilty of seven counts of obtaining property by false pretenses and one count of exploiting a disabled adult.[1] Defendant argues that the trial court's jury instructions, including the court's answer to a question from the jurors during their deliberations, require reversal of his convictions. After careful review of the record and applicable law, we hold that Defendant has failed to demonstrate error.

I. FACTUAL AND PROCEDURAL HISTORY

The State's evidence at trial tended to show the following facts regarding a series of transactions between Defendant and three consumers, as well as a pawn shop:

A. Lexus Repair Job

On or about 31 May 2014, Patricia McElroy ("McElroy") was in an accident wherein she sustained damage to her 1993 Lexus' front passenger's side, bumper, and headlight. That same day, on the recommendation of a tow truck driver, she took her car to Defendant for repairs. Despite an insurance adjustor's assessment that

[1] Defendant also was convicted of misdemeanor conversion, but has not presented any argument challenging that judgment. We therefore conclude he has abandoned that portion of his appeal.

the Lexus was "totaled," Defendant told McElroy he could repair it for $4,000. Two weeks later, on 13 June 2014, McElroy wrote a check payable to Defendant for $4,000. Over the course of the summer, McElroy contacted Defendant numerous times regarding the status of the repair work. Defendant blamed the delay on various factors, including being "very busy," ordering the wrong parts, and the difficulty in paying the high price for the parts. McElroy paid Defendant an additional $250 on 22 August 2014 for a repair of a bent frame, $270 on 26 August 2014 for fan sensors, $330 on 27 August 2014 for air bag sensors, and $550 on 29 August 2014 to paint the exterior of the car.

On 5 September 2014, McElroy and her cousin visited Defendant's business and found that the Lexus had not been repaired and the license plate was missing. McElroy filed a police report with the West Asheville Police Department, and, with the help of an officer, retrieved her vehicle. The work McElroy had paid for was not completed, the seats had been cut, the gas tank was empty, and between 2,000 and 3,000 miles had been added to the odometer. McElroy's GPS device, a tool box, and jumper cables were missing as well.

On 6 March 2016, Defendant was indicted for obtaining property by false pretenses allegedly committed on 31 May 2014. A superseding indictment was issued on 10 July 2017 listing $5,510 as the amount of property falsely obtained.

B. Chevy Astro and Kia Sparrow Repair Jobs

In April 2015, Lana Elingburg ("Elingburg") took her 1999 Chevy Astro to Defendant for custom modifications to make it more easily accessible for her father, who is in a nursing home. Elingburg also suffers from multiple sclerosis, which hinders her ability to walk, as well as much of her cognitive thinking and memory. Elingburg's father referred her to Defendant. Defendant told Elingburg he could complete the work for $300, and on 30 April 2015 she wrote him a check for that amount. On 3 May 2015, Elingburg wrote Defendant a check for $520 to purchase an adaptive kit he deemed necessary to make the modifications. On 15 May 2015, Elingburg wrote Defendant a check for $200 for the labor cost. She wrote Defendant another check three days later for $350 to install a fiberglass mat. On 20 May 2015, after Defendant claimed he could not pay his electric bill—which would prevent him from completing the work—Elingburg wrote him a check for $1,000 to cover the bill. Defendant never completed the work on the Astro.

On 25 May 2015, when Defendant claimed he was waiting for the necessary parts to fix the Astro, Elingburg brought her Kia Sparrow to Defendant to "bump out a dent" and "fix a couple of spots [in] the interior." Elingburg paid $550 for the work, which Defendant told her he could finish within four to five days. After the initial agreement, Defendant continued to request more payments for newfound problems associated with the Kia. Later in May and in June, Elingburg paid Defendant $269.56 and $260 to replace two locks, $150 for labor, $130 for paint, $750 for fabric,

$300 for more paint, $130 for clear enamel paint, $130 and $20 for an actuator, and $200 for other unstated expenditures. In total, Elingburg paid Defendant almost $2,000 for the Astro and approximately $3,000 for the Kia. When Elingburg went to retrieve the Kia in August or September 2015, she discovered that Defendant had failed to complete the work.

On 7 March 2016, Defendant was indicted for exploitation of a disabled adult and obtaining property by false pretenses, both offenses allegedly committed on 25 May 2015 and related to the Kia.[2] A superseding indictment on the false pretenses charge was issued on 10 July 2017 listing the property falsely obtained as $3,059.36.

C. Monte Carlo Custom Paint Job

In June 2013, Terry Johnson ("Johnson"), at the recommendation of a friend, brought his 1987 Chevrolet Monte Carlo to Defendant for a custom paint job. Defendant estimated it would take around a week to complete and charged $1,000 for the job, with half to be paid up front and the other half paid upon completion. By August 2013, however, before Defendant finished the agreed-upon work, Johnson had paid the full $1,000 in cash. One year later, in September 2014, the work was not complete. Johnson paid Defendant another $100 to apply a protective paint covering. Johnson checked on the Monte Carlo "an estimated thirty times" since leaving it with Defendant. Each time, Defendant requested more time to finish the work and told

[2] The record is silent as to whether any charges were brought against Defendant regarding the Astro.

Johnson that the Monte Carlo brought him more business and "good luck." After a year, Johnson was prevented from seeing the Monte Carlo.

Eventually, Johnson saw the Monte Carlo in Defendant's business yard and noticed that its "super sport wheels" had been removed. In November 2015, more than two years after Johnson hired Defendant to paint his vehicle, a police officer accompanied Johnson to Defendant's business to retrieve it. The Monte Carlo had not been painted, the passenger's side window was broken, the original wheels and tires were missing, standing water was in the floorboard with mold throughout, and the tape player was missing.

On 7 March 2016, Defendant was indicted for obtaining property by false pretenses allegedly committed on 1 June 2013 and felony conversion allegedly committed on 11 October 2014. A superseding indictment was issued on the false pretenses charge on 10 July 2017 listing the amount of $1,100 as the property falsely obtained.

D. Pawn Shop Transactions

Detective William Olson ("Detective Olson") was assigned to investigate the "super sport wheels" that Johnson claimed were taken by Defendant. Searching Defendant's name through a database, Detective Olson learned that Defendant had pawned the wheels four times with Leicester Pawn and Gun ("the pawn shop") in

exchange for $100 each time. Following each of the first three transactions, Defendant paid a fee with interest to retrieve the pawned wheels.

After Defendant pawned the wheels for the fourth time, Detective Olson visited the pawn shop, saw the wheels on display on the sales floor, and found records showing that Defendant had pawned them. After a search warrant was issued for the premises of Defendant's business, Detective Olson found multiple pawn receipts containing Defendant's name and the Monte Carlo wheels.

On 7 March 2016, Defendant was indicted on four counts of obtaining property by false pretenses for pawning the Monte Carlo wheels on 11 October 2014, 15 December 2014, 25 March 2015, and 6 August 2015. Superseding indictments were issued on all four charges on 10 July 2017 listing $100 for each count as the property falsely obtained.

E. Trial Proceedings

Defendant's cases came on for trial in Buncombe County on 13 February 2018, with an additional charge of unauthorized use of a motor vehicle.[3] At the close of the State's evidence, Defendant motioned to dismiss the charges. The trial court reduced the felony conversion charge to a misdemeanor, dismissed two non-related false

[3] The record does not disclose which vehicle Defendant was alleged to have used without authorization.

pretenses charges,[4] and otherwise denied Defendant's motion. At the close of Defendant's evidence, upon Defendant's renewed motion to dismiss, the trial court dismissed another false pretenses charge not related to the facts summarized above and denied dismissal of the remaining charges.

On 15 February 2018, the jury found Defendant guilty on seven counts of obtaining property by false pretenses—one count for each of the three consumer victims and for each of the four pawn shop transactions. The jury also found Defendant guilty on one count of exploiting a disabled adult, Elingburg, and one count of misdemeanor conversion. The jury found Defendant not guilty of unauthorized use of a motor vehicle. On 16 February 2018, the trial court consolidated the convictions into five judgments and sentenced Defendant to serve 10 to 21 months in prison, with credit of 140 days for time served awaiting trial; followed by four consecutive sentences of 60 months in prison, of which all but four months were suspended on the condition that Defendant comply with the terms of supervised probation. Those terms included an order that Defendant pay $27,153 in restitution and court costs. Defendant timely appealed.[5]

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[4] The trial transcript indicates that Defendant was also indicted on other false pretenses charges for transactions related to other individuals. Because these charges were dismissed, they are not relevant to this appeal.

[5] Defendant also filed a *writ of certiorari* under N.C. R. App. P. 21 in case this Court deemed his written notice of appeal defective. Pursuant to Rule 4(b), a notice of appeal must, in pertinent part, "designate the judgment or order from which appeal is taken." N.C. R. App. P. 4(b) (2018). Because the notice of appeal includes all five case numbers of the judgments and lists all of his convictions, Defendant's notice was proper and we dismiss as moot his petition for discretionary review.

II. ANALYSIS

A. Initial Jury Instructions

Defendant first argues that the verdict sheets and the trial court's initial jury instructions failed to contain essential details sufficient to differentiate the various alleged offenses in violation of his right to a unanimous jury verdict under Article I, Section 24 of the North Carolina Constitution. Although Defendant did not raise this argument at trial, "alleged constitutional error[s] occur[ing] during the trial court's instructions to the jury" may be reviewed for plain error. *State v. May*, 368 N.C. 112, 118, 772 S.E.2d 458, 462 (2015). But Defendant failed to argue plain error in his appellate brief, so he has waived this issue on appeal and we presume that the instructions on this issue "were without legal error." *Madden v. Carolina Door Controls, Inc.*, 117 N.C. App. 56, 62, 449 S.E.2d 769, 773 (1994); *accord* N.C. R. App. P. 10(a)(4) (2018) (allowing the reviewing court to review a criminal issue absent preservation so long as "the judicial action questioned is specifically and distinctly contended to amount to plain error").

B. Supplemental Jury Instruction

Defendant next contends that the trial court committed prejudicial error in a supplemental instruction regarding the intent required to commit the offense of obtaining property by false pretenses. As this issue was properly preserved below, we must determine whether Defendant has satisfied his burden of showing prejudice,

i.e., whether there is "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." N.C. Gen. Stat. § 15A-1443(a) (2017). We determine whether the jury instruction in question constitutes error based on the following analysis:

> On appeal, this Court considers a jury charge contextually and in its entirety. . . . The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by an [erroneous] instruction. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

Hammel v. USF Dugan, Inc., 178 N.C. App. 344, 347, 631 S.E.2d 174, 177 (2006) (internal quotation marks and citations omitted).

The trial court provided the following pattern jury instruction in instructing the jury on the theory of obtaining property by false pretenses:

> The defendant has been charged with seven separate charges of 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. Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it can be inferred. The intent of a person is determined by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw therefrom. Evidence of non-fulfillment of a contract obligation standing alone shall not establish the plan for intent to defraud. Fourth, that the

> alleged victim was, in fact, deceived by this representation. And fifth, that the defendant thereby obtained property from the alleged victim.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant made a representation and that this representation was false, that this representation was calculated and intended to deceive, that the alleged victim was, in fact, deceived by it, and that the defendant thereby obtained property from the alleged victim, it would be your duty to return a verdict of "guilty." 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."
>
> You must consider and determine separately as to each charge whether or not the State has proved beyond a reasonable doubt that the defendant is guilty.

About one hour after the jury began its deliberations, it asked the trial court a question: "Re: obtaining property by false pretenses, regarding the third basis, does intent imply intention to deceive at the original time of agreement with victim, or could it have come later on?" When the jury returned to the courtroom, the trial court repeated its original instruction—simply the pattern jury instruction for obtaining property by false pretenses—and then added the following:

> Now, as to your question regarding the third basis of guilt, "Does intent imply intention to deceive at the time of entering into an agreement with the alleged victim or can it have come later on," it doesn't necessarily have to occur at the time of the agreement or contract. *It has to occur prior to the receipt of property* is what I would instruct you on, *that the intent has to have occurred prior to the receipt of property*.

(emphasis added). Defendant argues that this supplemental instruction was legally erroneous and allowed the jury to find the requisite intent to deceive at a time later than Defendant's misrepresentations to each victim.[6] Defendant's trial counsel objected to the trial court's supplemental instruction to the jurors, contending that the trial court should tailor it to conform with the State's theory that Defendant had the intent to deceive his victims on the offense dates alleged in the indictments.

1. Auto Shop Transactions and Exploiting a Disabled Adult

The trial court's initial instruction to the jurors, which followed the pattern jury instruction for the offense of obtaining property by false pretenses, was consistent with the law of obtaining property by false pretenses. N.C.P.I. Crim. 219.10A (2018). To convict a defendant for obtaining property by false pretenses, the State must prove the following elements beyond a reasonable doubt: "(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another." *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980). Thus, the intent to deceive must be present at the time the false representation is made. *See State v. Blue*, 84 N.C. 807, 809 (1881) ("The verdict should have found that . . . defendant made the false

[6] Although some of Defendant's language in his brief could be construed as a fatal variance argument, he did not present that argument at trial and on appeal he cites no legal authority regarding the validity of the indictments. We thus review his appeal alleging error in the jury instructions without considering the relationship between the indictments and the instructions.

representation with intent to cheat, or that he made the statement under an honest conviction of its truth."); *State v. Speckman*, 92 N.C. App. 265, 274, 374 S.E.2d 419, 424 (1988) ("The supplemental instruction was as follows: 'I charge you the intent to deceive must have been present at the time the statement was made, not when the funds were received.' This instruction was correct[.]"), *rev'd on other grounds*, 362 N.C. 576, 391 S.E.2d 165 (1990). By contrast, the trial court's supplemental instruction departed from the pattern instructions by providing that intent could be found "prior to the receipt of property." But a departure from the pattern instruction is not *per se* error, much less reversible error in this case. *See State v. Bunch*, 363 N.C. 841, 846, 689 S.E.2d 866, 870 (2010) ("Use of the pattern instructions is encouraged, but is not required." (citations omitted)).

The State's evidence showed that Defendant entered into numerous transactions with each of the vehicle owners; Elingburg paid Defendant eleven times for work on her Kia, McElroy paid Defendant five times for work on her Lexus, and Johnson paid Defendant three times for paint and improvements to his Monte Carlo. It is clear from the jury's question to the trial court that it was asking whether intent had to be found at Defendant's initial representations with Elingburg, McElroy, and Johnson, or during any of his ensuing representations. Despite the trial court's deviation from the pattern instructions, when viewed in the context of the entire charge, *Hammel*, 178 N.C. App. at 347, 631 S.E.2d at 177, the supplemental

instruction is more of a truism than a misleading mischaracterization of the law. Because intent must be concurrent with a misrepresentation, and property received must be obtained as a result of that willful misrepresentation, it logically follows that property must be received subsequent to the formed intent, *i.e.*, "prior to the receipt of property."

In reviewing jury charges, our Supreme Court has held that "[w]e presume that jurors 'pay close attention to the particular language of the judge's instructions in a criminal case and that they undertake to understand, comprehend, and follow the instructions as given.' " *State v. Nicholson*, 355 N.C. 1, 60, 558 S.E.2d 109, 148 (2002) (quoting *State v. Trull*, 349 N.C. 428, 455, 509 S.E.2d 178, 196 (1998)). While the trial court did not clarify that intent still had to be simultaneous with a misrepresentation after answering the jury's question, it read the pattern jury instruction a second time prior to the supplemental instruction. Because we presume that the jurors heard the pattern jury instruction and understood it consistent with the trial court's supplemental instruction, there is no reasonable possibility that the result would have been different, as the law, instructed as a whole, was accurately portrayed throughout. The jurors were still instructed, and thus presumed to know, that they had to find that Defendant had formed the intent to deceive at the time he made a misrepresentation which resulted in him obtaining property. The trial court's supplemental instruction, read in the context of the pattern instruction, clarified that

in a case involving numerous misrepresentations and the receipt of numerous payments, such intent must have been formed before Defendant obtained *a* payment—not necessarily the first payment—from each victim.[7] *See State v. Tirado*, 358 N.C. 551, 581, 599 S.E.2d 515, 536 (2004) ("The law presumes that jurors follow the court's instructions." (citing *Parker v. Randolph*, 442 U.S. 62, 73, 99 S. Ct. 2132, 2139, 60 L. Ed. 2d 713, 723 (1979))).

For this same reason, Defendant's argument also fails with respect to his conviction of exploiting Elingburg, a disabled adult. Further, because that crime does not include as an element fraudulent intent at the time a representation is made, the supplemental jury instruction cannot have prejudiced Defendant. N.C. Gen. Stat. § 14-112.2(b) (2017).

2. Pawn Shop Transactions

We also hold that the trial court's supplemental instruction was not error with respect to Defendant's convictions for false pretenses related to the four pawn shop transactions. Defendant's separate dealings with the pawn shop involved only one receipt of property in each transaction. Upon each visit to the pawn shop, Defendant signed a pawn ticket declaring himself the true owner of the Monte Carlo wheels. *See*

[7] Because the jury's verdicts do not specify the date or dates of the offenses involving Elingburg, McElroy, and Johnson, we cannot determine what dates the jurors found that Defendant formed the criminal intent. As a result, the amount of funds Defendant would be criminally responsible for obtaining cannot be accurately calculated. However, Defendant did not raise this issue on appeal, and we will not consider it. *See Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) ("It is not the role of the appellate courts . . . to create an appeal for an appellant.").

State v. Jones, __ N.C. App. __, __, 808 S.E.2d 280, 285 (2017) ("Evidence that a defendant knowingly pawned stolen goods is sufficient to support a conviction for obtaining property by false pretenses, with the false representation being the defendant's representation that he owned, or was entitled to dispose of, the property being pawned."). And after each pawn ticket was signed, Defendant received $100. In other words, the jury was asked to consider each singular transaction in isolation, and it could *only* convict Defendant for these misrepresentations if he possessed the requisite intent at the time each one was made.

III. CONCLUSION

For the above reasons, we hold that the trial court did not err in instructing the jury that, with respect to the false pretenses charges, it could find the intent to deceive for obtaining property by false pretenses if Defendant formed such intent at any time before he received an item of property, and not necessarily at the outset of each transaction. When read in light of the entire jury instruction and in the context of the facts presented to the jury, the instruction was not in error and there is no reasonable likelihood that it misled the jurors.

NO ERROR.

Judges DILLON and COLLINS concur.

Report per Rule 30(e).