IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-26

No. COA19-745

Filed 16 February 2021

Cleveland County, Nos. 17CRS01461-62 & 17CRS051240

STATE OF NORTH CAROLINA

v.

MICHAEL LEE EAKES, Defendant.

Appeal by Defendant from judgment entered 2 August 2018 by Judge Forrest D. Bridges in Cleveland County Superior Court. Heard in the Court of Appeals 12 January 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Jessica V. Sutton, for the State.

Guy J. Loranger for the Defendant.

DILLON, Judge.

¶ 1 Michael Lee Eakes ("Defendant") appeals from a judgment entered upon a jury verdict finding him guilty of a number of offenses including obtaining property by false pretense.

I. Background

¶ 2 The evidence at trial tended to show Defendant obtained $266 from a landowner by false pretense as follows: The landowner wanted a well on his property. Defendant told the landowner that he knew of a company that would complete the work for a low price. Defendant presented a contract to the landowner, purportedly from a company that specialized in digging wells. Defendant told the landowner that he needed to collect a down payment and, in fact, collected $266 from the landowner. No work was ever performed. The evidence instead showed Defendant forged the contract to make it appear that it came from a reputable company; that Defendant did so to extract money from the landowner; that the company knew nothing of the contract; and that Defendant never intended to use the down payment to have the work performed.

¶ 3 Defendant was convicted for a number of crimes in connection with his deception, including one count of obtaining property (the $266 from the landowner) by false pretense. Defendant appeals.

II. Analysis

¶ 4 On appeal, Defendant challenges only his conviction for obtaining property by false pretense. Defendant's arguments concern whether the jury convicted Defendant for the "misrepresentation" as alleged in the indictment. Defendant makes two arguments, which we address in turn.

A. Ineffective Assistance of Counsel

¶ 5 First, Defendant argues that he was denied effective assistance of counsel. He contends that his trial counsel erroneously failed to move for dismissal of the false pretense charge during the trial, based on a fatal variance between the allegations contained in the indictment and the evidence offered by the State at trial concerning the nature of the misrepresentation made by Defendant.

¶ 6 The evidence offered by the State tended to show that Defendant made a representation to the landowner that he had procured a third-party (a reputable company) to dig the well. Defendant argues, however, that the indictment alleges that Defendant represented to the landowner that he*, himself*, (and not some third-party company) would dig the well. The relevant language in the indictment alleges that: "The defendant presented a fraudulent contract to bore a well, knowing at the time that he had no intention of doing the work for which he claimed to be equipped and for which he was paid."

¶ 7 We hold that there is no fatal variance between the indictment and the evidence on this point. We do not read the indictment so narrowly as Defendant advocates. The indictment alleges, and the evidence showed, that Defendant presented the fraudulent contract. The evidence further showed that Defendant had represented that he would "work" as a go-between to procure a contract for the digging of a well. While the indictment could have been more precise in stating the nature of the "work" Defendant represented he would do, the reference to the

fraudulent contract as part of the misrepresentation was sufficient to put Defendant on notice of the crime for which he was being charged. Indeed, "[t]he purpose of an indictment or criminal summons is to inform a party so that he may learn with reasonable certainty the nature of the crime of which he is accused." *State v. Coker*, 312 N.C. 432, 437, 323 S.E.2d 343, 347 (1984). Because the indictment was sufficient to charge the crime, counsel's failure to object was not deficient and therefore was not ineffective. *See State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (stating that to prove ineffective assistance of counsel, a defendant must first show that counsel's performance was deficient).

B. Jury Instruction

¶ 8 Second, Defendant argues that the trial court committed plain error by instructing the jury on false pretense generally, without specifying the nature of false representation that had been alleged in the indictment. Specifically, Defendant contends that the trial court erred by making a broad reference to "a representation" by Defendant to the landowner instead of providing the exact details of the misrepresentation as alleged in the indictment. Since, however, Defendant did not object at trial to the jury instructions, we review Defendant's argument for plain error. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

¶ 9 We have held that "[a] jury instruction that is not specific to the misrepresentation in the indictment is acceptable so long as the court finds no fatal

variance between the indictment, the proof presented at trial, and the instructions to the jury." *State v. Ledwell*, 171 N.C. App. 314, 320, 614 S.E.2d 562, 566 (2005).

¶ 10 Assuming the jury instructions were erroneous for failing to specify the nature of the misrepresentation, we conclude that the error did not rise to the level of plain error. The crux of the case centered on a single event, that Defendant collected a down payment from the landowner for the digging of a well on the landowner's property, using a forged contract from a reputable company as part of his ruse, but that Defendant's intent was to keep the money for his own use. Accordingly, we conclude that the jury instructions did not constitute error, much less plain error.

III. Conclusion

¶ 11 We conclude that Defendant received a fair trial, free from reversible error. He did not receive ineffective assistance of counsel, and the trial court did not plainly err when it instructed the jury.

NO ERROR.

Judges INMAN and ARROWOOD concur.

Report per Rule 30(e).