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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-19

No. COA20-842

Filed 4 January 2022

Lenoir County, No. 18-CRS-051995, 051996, 051997.

STATE OF NORTH CAROLINA,

v.

PHILIP BRANDON DAW, Defendant.

Appeal by Defendant from judgments entered on 24 September 2019 by Judge Frank Jones in Lenoir County Superior Court. Heard in the Court of Appeals 2 November 2021.

*Attorney General Joshua H. Stein, by Assistant Attorney General Torrey D. Dixon, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily Holmes Davis, for the Defendant.*

JACKSON, Judge.

¶ 1 Philip Brandon Daw (“Defendant”) appeals from judgments entered upon jury verdicts for three counts of obtaining property by false pretenses, a violation of N.C. Gen. Stat. § 14-100(a). On appeal, Defendant argues that the State failed to produce evidence of intent for two of his convictions. We find no error.

## I. Background

¶ 2 In 2017, Defendant formed Daw Construction, LLC, a Clinton-based construction company where he was the sole owner and operator. From July 2017 to April 2018, Defendant entered into construction contracts with nine homeowners: P. Price, D. Grizzard, R. Brown, T. Howard, T. Stiles, C. Hobbs, E. Koss, J. Augusta, and P. Howard. Three of these clients' contracts, R. Brown, T. Howard, and P. Howard, resulted in the underlying obtaining property by false pretenses convictions in this case. The six other contracts were admitted as 404(b) evidence.

### A. The Contracts Underlying Defendant's Convictions

¶ 3 **Brown Contract.** In July 2017, after seeing a Craigslist ad for Defendant's services, Mr. Brown contacted Defendant about constructing a barn and garage on his property in Deep Run. On 31 July 2017, Defendant visited Mr. Brown's home and estimated that the project would cost around \$26,000. The parties negotiated the price down to \$21,000, and in exchange, Defendant requested upfront payment. The parties entered into a contract and Mr. Brown paid Defendant \$21,000 that day. In the contract, Defendant agreed to complete the project in three weeks "depending on scheduling and weather."

¶ 4 The following day, Mr. Brown called Defendant to ask about the building permit that needed to be obtained for the project. Defendant refused to obtain the permit. Two days after signing the contract, Mr. Brown cancelled the check written

to Defendant. After the check had been cancelled, Defendant agreed to obtain a building permit. Mr. Brown and Defendant entered into a new contract on 3 August 2017, which included the same terms as their original contract. Defendant was again paid \$21,000 by check, which he cashed.

¶ 5 In August 2017, Defendant obtained a building permit for the project. However, Defendant did not return to Mr. Brown's residence to begin the project in August or September. After Mr. Brown called Defendant and complained about the delay, Defendant sent two men to Mr. Brown's property in October, who left two boards and four poles in Mr. Brown's yard. Sometime in November, Defendant sent someone to the property to shovel dirt and build a frame for pouring concrete.

¶ 6 After additional delays on the project, Mr. Brown called Defendant, threatening to sue. The next day, Defendant arrived with additional workers who poured concrete into the frame and put posts in the ground. After another delay, on 24 December, workers constructed the barn frame, added trusses, added boards to part of the roof, and added tarpaper. Thereafter, Defendant never spoke to Mr. Brown again, never sent any additional workers, never began constructing the garage, and never issued Mr. Brown a refund.

¶ 7 **T. Howard Contract.** In September 2017, Mr. Howard planned to have a detached building built behind his home, and he was referred to Defendant. Defendant visited Mr. Howard's home to discuss the project. Defendant told Mr.

Howard that if he contacted the Better Business Bureau, he would likely learn bad information about his services due to a displeased client. About a week after their initial discussion, Defendant and Mr. Howard reached a verbal agreement for Defendant to complete the project. Defendant told Mr. Howard that half of the contract price needed to be paid upfront. On 7 September 2017, the parties entered into a construction contract for \$28,900, and Mr. Howard paid Defendant \$14,550 that day. In the contract, Defendant agreed to begin construction on 28 September 2017 and complete the building on 19 October 2017, “depending on [the] weather.” However, when the project did not begin as planned, Mr. Howard repeatedly called Defendant complaining about the delay. Defendant did not begin construction until the first week of November. Defendant sent workers a total of two times to Mr. Howard’s property. The workers dug a space for the building’s foundation and placed some posts in the ground. Defendant never returned to complete the project, and Defendant told Mr. Howard that he would never receive a refund because Defendant was filing for bankruptcy.

**P. Howard Contract.** In the fall of 2017, Officer Howard met Defendant while on duty as a North Carolina Highway Patrol Trooper. Officer Howard responded to a call from Defendant, whose car had broken down. While assisting Defendant, Officer Howard mentioned that he was interested in building an in-ground pool on his property in Pink Hill, and Defendant offered to construct it. After

their initial encounter, Defendant visited Officer Howard's home to discuss the specifics of the pool construction project and they came to an agreement. On 18 April 2018, Officer Howard and Defendant entered into a contract for Defendant to build the pool for \$40,000. As requested by Defendant, Officer Howard paid a portion of the contract price, \$20,000, the day after signing. The contract terms indicated that Defendant would begin work five to six weeks after the date the contract was signed and finish the project two to three weeks after the start date. Other than coming by the property to take measurements, Defendant never began the project. One week after the work was supposed to have begun, Defendant told Officer Howard that he had filed for bankruptcy, although Defendant admitted at trial that he never actually filed for bankruptcy. Officer Howard never received a refund, and at some point, when Officer Howard asked Defendant about his deposit, Defendant told him "you will never get one penny of this money."

#### **B. The Contracts Admitted as 404(b) Evidence**

¶ 9 The following contracts were admitted as 404(b) evidence to prove Defendant's motive, intent, modus operandi, existing plan, scheme, system or design, and the absence of mistake.

¶ 10 **Grizzard Contract.** In July 2017, Mr. Grizzard contacted Defendant about building a metal roof to cover the porch of his Greenville home after seeing Defendant's services advertised online. Defendant visited Mr. Grizzard's home where

he examined the property and agreed with Mr. Grizzard to build the roof. On 31 July 2017, Defendant and Mr. Grizzard entered a contract where Defendant agreed to build the roof for \$32,500, and Mr. Grizzard paid \$21,000 upfront. The contract provided that after two weeks to secure the necessary materials, the project would begin and would be completed within three weeks of the start date, depending on the “weather and schedule.” After three or four weeks had passed, Mr. Grizzard began calling Defendant to inquire about the project’s start date. Defendant told Mr. Grizzard that the construction materials for the roof had arrived at Defendant’s shop. However, Mr. Grizzard paid Defendant’s shop a visit and discovered no such materials. Defendant never began constructing Mr. Grizzard’s roof, and Mr. Grizzard never received a refund from Defendant.

¶ 11       **Stiles Contract.** In September 2017, Mr. Stiles found an advertisement of Defendant’s services and contacted Defendant about constructing a building on his property which he could use to restore old cars with his sons and grandsons. On 22 September 2017, Defendant called Mr. Stiles and told him that if they could quickly come to an agreement, he could have the building complete in two to three weeks. Mr. Stiles agreed to the project over the phone, and Defendant emailed him the contract, which provided that the total cost was \$28,740. That same day, Mr. Stiles paid Defendant a \$17,250 deposit. On 9 October 2017, Defendant visited Mr. Stiles’s property, dropped off ten beams, and left without completing any work. After weeks

had passed without the project progressing, Mr. Stiles texted Defendant on 17 October 2017 asking if he had filed for a building permit, but Defendant never responded. One month later, on 17 November 2017, Defendant brought a few workers and a Bobcat to Mr. Stiles's property, and they set posts in the ground.

¶ 12 After months of inactivity, Mr. Stiles drove to Clinton to meet with Defendant expressing concerns about the project's completion. Defendant and Mr. Stiles entered into a new contract, where Defendant agreed to build a larger building than the one originally promised with a completion date of 7 April 2018. On 3 April 2018, Mr. Stiles allowed Defendant to extend the completion date to 30 April 2018. In mid-April, Defendant returned to Mr. Stiles's property to dig a ditch line and remove the posts he had installed months previously. After that, Defendant never returned to the property or completed any work towards the project. Mr. Stiles never received a refund.

¶ 13 **Price Contract.** In July 2017, Mr. Price desired to add a two-car garage to his home in Burgaw, and Defendant's services were referred to him. On 17 July 2017, Defendant visited Mr. Price's home to discuss the project and examine the property. On 24 July 2017, Defendant returned to Mr. Price's home and they entered into a contract for the garage construction. Under the contract terms, the total price would be \$55,000, and Mr. Price was required to pay \$25,000 upfront, which he paid the day of signing. On 27 July 2017, Mr. Price paid Defendant an additional \$5,000. Over

the following months, Defendant visited Mr. Price's property to discuss the project three times, but never actually completed any work on the project. Defendant eventually refunded \$3,500 to Mr. Price, after Mr. Price hired an attorney and criminal charges were filed against Defendant.

¶ 14       **Koss Contract.** In November 2017, Mr. Koss contacted Defendant about expanding his home garage after finding Defendant's Craigslist advertisement online. On 17 November 2017, an employee of Defendant's visited Mr. Koss's home and proposed an agreement for Defendant's company to complete the project. Mr. Koss entered into a contract with Defendant that day, agreeing to pay \$20,000 for the expansion and \$12,000 upfront. The project was scheduled to be completed before Christmas Day that year. After the start date continued to be delayed, Mr. Koss adjusted the project plans, requesting a bigger garage than the parties originally agreed to. Mr. Koss and Defendant entered into a new contract where Defendant agreed to build the bigger garage for an additional \$4,000, which Mr. Koss paid upfront. After modifying their agreement, in February 2018, Defendant visited the property to clear some brush and cut down a small tree. Defendant never completed any further work on the project and missed a total of 14 appointments scheduled with Mr. Koss. Defendant told Mr. Koss that if he hired a lawyer or reported Defendant to the police that he would never hear from Defendant again. Nevertheless, Mr. Koss contacted the police and criminal charges were brought against Defendant. Pursuant



to an agreement not to prosecute, Defendant refunded \$14,000 to Mr. Koss.

¶ 15           **Hobbs Contract.** In November 2017, Defendant’s services were referred to Mr. Hobbs, who desired to have a building constructed on his Wilmington property to use for restoring vehicles. Defendant visited Mr. Hobbs’s property in early November, and that same day, they agreed that Defendant would complete the project. Mr. Hobbs conveyed to Defendant that the building needed to be completed within 90 days to meet business deadlines, and Defendant assured Mr. Hobbs that he could meet this deadline. Defendant also told Mr. Hobbs that he required an upfront deposit. On 6 November 2017, Mr. Hobbs and Defendant entered into a contract for the construction of the building for \$75,000. Mr. Hobbs paid Defendant \$45,000 upfront. In the following weeks, Defendant began clearing trees from Mr. Hobbs’s land. After clearing the trees, Defendant requested an additional \$5,000, which Mr. Hobbs paid on 28 November 2017. At the end of December, Defendant removed more trees from the property, leveled dirt, and drilled holes for setting building posts. Thereafter, Defendant did not return to Mr. Hobbs’s property and Mr. Hobbs never received a refund.

¶ 16           **Augusta Contract.** In March 2018, Mr. Augusta’s wife reached out to Defendant for his services when Mr. Augusta needed a building constructed on his Riegelwood property to store his bus, which he used as a mobile shaved ice business. Defendant visited the property on 21 March 2018 and agreed to complete the project.

Under the contract terms, Defendant agreed to construct the shelter for \$30,020, and Mr. Augusta agreed to pay Defendant \$15,010 upfront. Per the contract, Defendant was scheduled to begin construction on 11 May 2018 and complete all or most of the project by 30 May 2018. On 4 May 2018, Defendant visited Mr. Augusta's home and told him he needed a deadline extension because his wife was in labor with twins and was having health complications. Mr. Augusta agreed to extend the start date by a week. Defendant never returned to Mr. Augusta's property to begin constructing the building. Sometime in 2019, Defendant spoke to Mr. Augusta about a repayment plan to refund Mr. Augusta's money, but ultimately none of the money was refunded.

\* \* \*

¶ 17 In addition to the above, the State presented evidence showing that: (1) other than Mr. Brown's project, Defendant did not request or obtain building permits for any of the contracted projects, (2) Defendant did not have a valid general contractor's license<sup>1</sup> until 17 October 2017, and (3) on 21 February 2018, just four months after issuance, the North Carolina Board for General Contractors notified Defendant that he could no longer accept contracts for costs exceeding \$30,000. Defendant testified

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<sup>1</sup> In North Carolina, a general contractor's license is required to perform construction projects costing \$30,000 or more. N.C. Gen. Stat. § 87-1(a) (2019). Defendant never personally had a general contractor's license because he could not pass the exam. Daw Construction, LLC was able to obtain a license for a brief period due to a "qualifier" under § 87-10(b) being associated with the company. When the qualifier left the company, Daw Construction, LLC voluntarily surrendered its license.

that he intended to complete the projects at the time he entered into each contract, but that the clients either fired him or cancelled the contracts before he could fulfill his obligations.

¶ 18 On 16 September 2019 in Lenoir County Superior Court, Defendant was tried for three counts of obtaining property by false pretenses, based on his contracts with Mr. Brown, Mr. Howard, and Officer Howard. At trial, Defendant moved to dismiss the charges for insufficient evidence, but this motion was denied. On 24 September 2019, the jury returned a verdict of guilty on all charges. After Defendant pled guilty to an aggravated sentencing factor, the trial court sentenced Defendant to three consecutive aggravated terms of seven to 18 months imprisonment.

¶ 19 Defendant entered notice of appeal in open court.

## II. Analysis

### A. Standard of Review

¶ 20 “In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator.” *State v. Golder*, 374 N.C. 238, 249, 839 S.E.2d 782, 790 (2020) (internal quotation and citation omitted). “Substantial evidence is the amount necessary to persuade a rational juror to accept a conclusion.” *Id.* (internal marks and citation omitted). On appeal, “[w]hether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we

review the denial of a motion to dismiss de novo.” *Id.* at 250, 839 S.E.2d at 790.

## **B. Intent**

¶ 21 The elements for obtaining property by false pretenses in North Carolina are “(1) a false representation of a past or 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 the defendant obtains or attempts to obtain anything of value from another person.” *State v. Compton*, 90 N.C. App. 101, 103, 367 S.E.2d 353, 354 (1988) (citation omitted); N.C. Gen. Stat. § 14-100(a) (2019). Defendant’s sole argument on appeal is that the State failed to establish the requisite intent for two of his obtaining property by false pretenses convictions. Specifically, Defendant argues that the State failed to establish that Defendant did not intend to construct the buildings when he accepted payment from Mr. Brown and Mr. Howard. We disagree.

¶ 22 Fraudulent intent “is seldom provable by direct evidence, and must usually be shown through circumstantial evidence.” *See Compton*, 90 N.C. App. at 104, 367 S.E.2d at 355. “In determining the absence or presence of intent, the jury may consider the acts and conduct of the defendant and the general circumstances existing at the time of the alleged commission of the offense charged.” *State v. Braswell*, 225 N.C. App. 734, 740, 738 S.E.2d 229, 233 (2013) (internal quotations and citation omitted).

While evidence of a person’s character or a trait of his

character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, such evidence may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

*State v. Barker*, 240 N.C. App. 224, 237, 770 S.E.2d 142, 151 (2015) (internal marks and citation omitted); N.C. Gen. Stat. § 8C-1, Rule 404(a), (b) (2019).

¶ 23 The introduction of 404(b) witness testimony establishing a pattern, motive, or scheme occurring in the “same general timeframe” as the underlying indictments may be substantial evidence for a rational juror to deduce fraudulent intent. *See Barker*, 240 N.C. App. at 232, 770 S.E.2d at 148. For example, in *Barker*, the defendant was convicted on two counts of obtaining property by false pretenses and, on appeal, argued the State’s evidence was insufficient to support the convictions. *Id.* at 228, 230-31, 770 S.E.2d at 146, 147. The State presented witness testimony of “the two victims alleged in the indictments, as well as Rule 404(b) witness testimony by four other individuals who had been subjected to defendant’s fraudulent roof repair scheme.” *Id.* at 236, 770 S.E.2d at 151. All of the testimony tended to show that, within the “same general timeframe,” the defendant targeted elderly individuals offering to complete costly and unnecessary roof repairs, and “[i]n each instance, defendant would either begin but never complete the roof repair, or would do a substandard job on the repair.” *Id.* at 232, 770 S.E.2d at 148. We held that this

evidence was “more than sufficient to sustain the charges of obtaining property by false pretense[.]” *Id.* at 232-33, 770 S.E.2d at 148.

¶ 24 Defendant, however, argues that this case is more similar to *Compton* than *Barker*. We disagree. In *Compton*, the defendant was convicted on one count of obtaining property by false pretenses for violating a land sale contract. 90 N.C. App. at 102-03, 367 S.E.2d at 354. On appeal, the defendant argued the State’s evidence was insufficient to support the conviction. *Id.* at 103, 367 S.E.2d at 354. We agreed with the defendant, holding that “the record discloses no [] incriminating evidence[.]” aside from the defendant’s failure to fulfill a promise. *Id.* at 104, 367 S.E.2d at 355. Moreover, we held that there was actually “some evidence that [the defendant] did not intend to defraud” the victim. *Id.* at 105, 367 S.E.2d at 355. Because N.C. Gen. Stat. § 14-100(b) “provides that evidence of the nonfulfillment of a contractual obligation, standing alone, is not sufficient to show an intent to defraud[.]” and there was no other evidence of the defendant’s fraudulent intent, we concluded that the evidence was insufficient for a reasonable juror to deduce that the defendant intended to defraud the victim. *Id.* at 104, 367 S.E.2d at 355.

¶ 25 We hold that the facts here are more similar to *Barker* than *Compton*. Unlike in *Compton* where “the record disclose[d] no [] incriminating evidence” other than the defendant’s contractual violation, *id.* at 104, 367 S.E.2d at 355, here, the State presented six witnesses’ testimony as 404(b) evidence of Defendant’s intent.

Defendant does not challenge the admissibility of the 404(b) evidence on appeal, but rather, argues that it is not sufficient to support a finding of deceptive intent. However, as explained *supra*, fraudulent intent is seldom proved by direct evidence, and to determine whether intent existed “the jury may consider the acts and conduct of the defendant and the general circumstances existing at the time of the alleged commission of the offense charged.” *Braswell*, 225 N.C. App. at 740, 738 S.E.2d at 233 (internal quotations and citation omitted).

¶ 26 We hold that the State produced substantial evidence for a rational juror to deduce that Defendant did not intend to complete the construction projects at the time he collected payment from Mr. Brown or Mr. Howard. Like in *Barker*, here, the State presented 404(b) evidence from the same general timeframe of the allegations which tended to establish a pattern, motive, or scheme; in *Barker*, the State presented four 404(b) witnesses, and here, the State presented six 404(b) witnesses. In *Barker*, all the 404(b) testimony tended to show that, around the same time period, the defendant targeted elderly individuals, contracted to complete costly and unnecessary roof repairs, and either never completed or performed a substandard job on all the repairs. Here, similarly, all the 404(b) testimony tended to show that, in a period spanning less than a year, during which Defendant contracted with Mr. Brown and Mr. Howard, Defendant repeatedly contracted to complete costly construction projects, often without a valid general contractor’s license, requested and cashed

large upfront payments, did not complete any meaningful work on the projects (and often only did any work after client complaints), repeatedly missed promised deadlines, and never obtained building permits on any of the projects (except when forced to by Mr. Brown). Cumulatively, this evidence tended to show that Defendant did not intend to complete Mr. Brown or Mr. Howard's projects at the time he entered into the contracts. As in *Barker*, here, the evidence was "more than sufficient" to support Defendant's convictions for obtaining property by false pretenses.

### III. Conclusion

¶ 27 Because we conclude that the State produced substantial evidence to persuade a rational juror to find that Defendant intended to deceive the victims when he collected payment and entered into their respective contracts, we therefore hold that Defendant has failed to demonstrate any error.

NO ERROR.

Judges MURPHY and GRIFFIN concur.

Report per Rule 30(e).