181 N.C.App. 150
Unpublished Disposition
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Court of Appeals of North Carolina.

STATE of North Carolina
v.
Fred Hudson CULBERTSON.

No. COA06-479. | Jan. 2, 2007.

Opinion

***1** Appeal by defendant from judgment entered 22 September 2005 by Judge Christopher M. Collier in Union County Superior Court. Heard in the Court of Appeals 2 November 2006.

Attorneys and Law Firms

Attorney General Roy Cooper, by Assistant Attorney General Susan R. Lundberg, for the State.

Donald J. Willey, for the defendant.

LEVINSON, Judge.

Fred Hudson Culbertson (defendant) appeals from judgment entered on convictions of obtaining property by false pretenses, felony conversion by a bailee, and improper issuance of temporary registration plates. We vacate in part and affirm in part.

Defendant formerly engaged in buying, selling, and repairing of motor homes and recreational vehicles. This appeal arises from charges against defendant alleging illegal actions in the course of several business transactions. In 1999 defendant was charged with improper issuance of temporary registration plates, in violation of N.C. Gen.Stat. § 20-79.1 (2005), and indicted for obtaining property by false pretenses, in violation of N.C. Gen.Stat. § 14-100 (2005). In December 2000 he was indicted for felony conversion by a bailee, in violation of N.C. Gen.Stat. § 14-168.1 (2005). The charges were joined for trial, and were tried before a jury during the week of 19 September 2005.

The evidence at trial is summarized, in pertinent part, as follows: In 1998 defendant was the owner and president of Carolina Country RV ("Carolina Country"). In October 1998 Jonathan Neuman consigned a Pace Arrow Motor Home to Carolina Country. Neuman and defendant agreed that defendant would sell the motor home on behalf of Neuman. In July 1999 Mr. Donnie Hatley, an inspector with the North Carolina Department of Motor Vehicles, received a complaint from Neuman, who told Hatley that the motor home had been sold in May of 1999 and that defendant had not paid Neuman any money. Hatley also received a complaint from Mr. Frank Byrum, who said that he and his wife had bought the Neuman's motor home in May of 1999 but never received a license plate or title.

Hatley testified that dealers generally provide a duly signed title at the time of delivery of the vehicle. If that is not possible, the dealer may issue a temporary tag or "30 day marker" and a temporary registration certificate, allowing the purchaser to drive the vehicle. Thereafter, the dealer must obtain a title, registration, and license plate from the North Carolina DMV within ten days of the sale. On 19 November 1999 defendant's dealers' license was revoked, effectively putting Carolina Country out of business as a dealer in new and used motor homes. Frank Byrum testified that in May 1999 he and his wife brought their travel trailer to Carolina Country for repair. They saw the Coachman Pace Arrow that had been consigned by the Neumans, and wanted to buy it. Defendant told the Byrums that he was the owner of the vehicle. Defendant did not tell the Byrums that the motor home belonged to the Neumans or that it was subject to a prior lien. The Byrums traded in their travel trailer, paid a $20,000 down payment, and financed the rest of the purchase price. For the following two months Byrum repeatedly asked defendant for the title and permanent license plate. Defendant made various excuses for not providing these, and changed the date on the temporary tag to allow Byrum to use it for an additional month. Hatley testified that this was illegal, and that a dealer was not allowed to extend the use of a "30 day marker" beyond the initial thirty days.

***2** Eventually, Byrum learned that the motor home was owned by the Neumans, and that the purchase money had neither been paid to Mr. and Mrs. Neuman, nor used to pay off the original lien on the vehicle. By that time, defendant was in bankruptcy proceedings, and it took over a year for Byrum to reach a resolution of the situation and obtain a title and license. Byrum testified that defendant had specifically told him that he was the president of Carolina Country, and that he owned the Pace Arrow motor home.

Dr. Jonathan Neuman testified that he and his wife consigned their Coachman Pace Arrow to Carolina Country for defendant to sell on their behalf. Neuman did not sell the motor home to defendant. When Neuman learned that the motor home had been sold to Mr. andMrs. Byrum, defendant promised to pay him the agreed-upon amount. However, defendant never paid him any money for the sale of the travel trailer, and never paid off the bank loan outstanding on it. Eventually, Neuman and Byrum each paid part of the lien, and the bank forgave the rest of the debt.

Mr. David Cook, Ms. Shirley Nieding, and Union County Deputy Sheriff Malcolm Murray testified about a transaction involving defendant, Cook, and Nieding. Cook, a professional singer, consigned his tour bus to Carolina Country. Cook and defendant agreed that Carolina Country would sell the bus "as is" without any repairs or improvements. However, Cook later returned to the dealership and found his bus "gutted," with carpeting, cabinets, furniture, and other fixtures stripped out. He learned that defendant had sold the bus to Nieding, who bought it on the condition that defendant renovate it to her specifications. Cook was angry at defendant for selling the bus without consulting him, and for entering into the repairs without his approval. The defendant told Cook that he would be paid when Nieding took possession of the bus. However, defendant never told Cook that Nieding had already paid over $50,000 towards the cost of the bus, and he never paid Cook any money for the sale of the bus. On 26 April 2000 Cook met with law enforcement authorities and, on their advice, he repossessed his bus. Cook later spent over $20,000 to repair the gutted interior of the bus.

Shirley Nieding testified that when she bought Cook's bus, various renovations and repairs were part of the sales agreement. She bought the bus for $38,000, and paid defendant about $62,000 to include the purchase price and some of the repairs. She never received a refund, the bus, or a title to the bus. When Cook spoke with Ms. Nieding, she was upset to learn that Cook had reclaimed his bus. In the presence of several law enforcement officers, Neiding called defendant and asked when she could get the bus. Although defendant knew that Cook had already repossessed the bus, he told her that she could have it the next day.

Two other witnesses testified about similar transactions with defendant. Each witness had bought a recreational vehicle, and in both cases the defendant failed to deliver a title or to pay off the outstanding lien on the vehicle with the purchase money.

***3** Defendant was convicted of all charges. The trial court entered judgment notwithstanding the verdict on one count of obtaining property by false pretenses, and dismissed that charge. Defendant received an active sentence of six to eight months for obtaining property by false pretenses and improper issuance of tags. He was given a suspended term of six to eight months for felony conversion, which was to be served consecutively to the other sentence. Defendant appeals.

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Preliminarily, we note that defendant has not argued that his conviction of improper issuance of temporary license plates should be reversed. Accordingly, we consider only his convictions of obtaining property by false pretenses and felony conversion by a bailee. Defendant first argues that the indictment charging him with felony conversion was fatally defective because it did not identify the owner of the property that defendant is alleged to have converted. We agree.

Felony conversion by a bailee is governed by N.C. Gen.Stat. § 14-168.1 (2005), which provides in pertinent part that:

> Every person entrusted with any property as bailee, ... who fraudulently converts the same, or the proceeds thereof, to his own use ... [if] the value of the property converted ... or the proceeds thereof, is in excess of four hundred dollars ($ 400.00) ... is guilty of a Class H felony....

Regarding conversion, this Court has held that:

> [A]n essential component of the crime is the intent to convert or the act of conversion, which by definition requires proof that someone other than a defendant owned the relevant property. Because the State is required to prove ownership, a proper indictment must identify as victim a legal entity capable of owning property. An indictment that insufficiently alleges the identity of the victim is fatally defective and

> cannot support conviction of either a misdemeanor or a felony.

State v. Woody, 132 N.C.App. 788, 789-90, 513 S.E.2d 801, 803 (1999); *see also State v. Burroughs*, 147 N.C.App. 693, 696, 556 S.E.2d 339, 342 (2001) (certain cases "involve the offenses of larceny and/or conversion-offenses in which it is crucial that the identity of the owner of the property be properly alleged and proven at trial").

> In the instant case, the indictment for felony conversion states that on or about the date shown on the indictment: [T]he defendant named above unlawfully, willfully and feloniously did being entrusted with property, a ... Tour Cruiser tour bus, as a person with a power of attorney to sell or transfer the property, fraudulently convert the property to the defendant's own use and convert the proceeds of the property to the defendant's own use. The value of the property was in excess of $400.00.

There is no allegation as to the owner of the property that defendant is charged with converting, and thus the indictment is invalid. "A valid indictment is a predicate for jurisdiction." *State v. Williams*, 153 N.C.App. 192, 194, 568 S.E.2d 890, 892 (2002) (citing *State v. McBane*, 276 N.C. 60, 65, 170 S.E.2d 913, 916 (1969)). Accordingly, defendant's conviction for felony conversion must be vacated.

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***4** Defendant next argues that there was a "fatal variance" between the facts alleged in the indictment for obtaining property by false pretenses and the evidence adduced at trial. However, defendant never states what this "variance" might be, either in the assignment of error or in his appellate argument. "Assignments of error ... in support of which no reason or argument is stated or authority cited, will be taken as abandoned." N.C. R.App. P. 28(b)(6). This assignment of error is overruled.

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Defendant argues next that the trial court erred by denying his motion to dismiss the charges against him at the close of all the evidence, on the grounds that the evidence was insufficient to submit the charges to the jury. As we are vacating defendant'sconviction for conversion, we do not reach the issue of the sufficiency of the evidence on that charge. Regarding the charge of obtaining property by false pretenses, defendant argues that there was insufficient evidence. We disagree.

"In evaluating the sufficiency of the evidence, we must determine if there was substantial evidence of each essential element of the crime charged." *State v. Elliott*, 360 N.C. 400, 412, 628 S.E.2d 735, 743-44 (2006) (citing *State v. Smith*, 307 N .C. 516, 518, 299 S.E.2d 431, 434 (1983)). " 'Substantial evidence' is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion." *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004) (citations omitted). "The trial court must review the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom." *State v. Squires*, 357 N.C. 529, 535, 591 S.E.2d 837, 841 (2003) (citing *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)).

The elements of the offense 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. Parker*, 354 N.C. 268, 284, 553 S.E.2d 885, 897 (2001) (citing *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980)). Defendant argues that there was insufficient evidence that he obtained property by false pretenses under a theory of acting in concert. He does not assert that the evidence was insufficient to submit the offense to the jury under the theory that he acted alone. In that regard, we note that there was evidence that the defendant: (1) falsely represented to the Byrums that he owned the motor home that he sold to them; (2) knew that the Neumans were the true owners; (3) accepted payment from Mr. and Mrs. Byrum; (4) did not use the funds to pay off the lien on the bus; (5) did not tell the Neumans that it was sold; and (6) did not deliver a title to the Byrums. This is sufficient evidence to submit the charge of obtaining property by false pretenses to the jury. This assignment of error is overruled.

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***5** Finally, defendant challenges the admission of certain testimony admitted pursuant to North Carolina Rules of Evidence, Rule 404(b). Defendant assigns error to the trial court's purported denial of his "motion *in limine* " to exclude the evidence. However, defendant neither made a motion *in limine*, nor objected when the testimony was presented during trial. Under the North Carolina Rules of Appellate Procedure "to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion[.]" N.C.R.App. P. 10(b)(1) (2005). Further, defendant does not argue that the admission of this evidence constituted plain error. We conclude that defendanthas failed to preserve this issue for appellate review. This assignment of error is overruled.

For the reasons discussed above, we conclude that the conviction of felony conversion by a bailee must be vacated. We further conclude that defendant received a fair trial, free of prejudicial error, on the charges of obtaining property by false pretenses and improper issuance of a temporary license.

Vacated in part, no error in part.

Judges GEER and JACKSON concur.
Report per Rule 30(e).

Parallel Citations

639 S.E.2d 454 (Table), 2007 WL 3926 (N.C.App.)

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