

## **FRAUD**

### **(1) Sufficient Evidence to Support Conviction of Obtaining Property by False Pretenses by Using Stolen Credit Cards at Store**

*State v. Perkins, 181 N.C. App. 209, 638 S.E.2d 591 (2 January 2007).*

The defendant was seen in the morning with another person (Brooks) in a hallway of a law office and beyond the public reception area. Neither had permission to be there, and the defendant gave a false explanation for her presence. That afternoon a person matching Brooks' description was seen coming from a lawyer's office, where it was later discovered that the lawyer's credit and check cards were stolen and used by the defendant and Brooks to buy merchandise at a grocery store. The defendant admitted to an officer that she was given the cards by "Steve" (the first name of Brooks), and the stolen cards were found at the same house where the defendant and Brooks were arrested. The jury returned verdicts finding the defendant guilty of misdemeanor breaking or entering, felony larceny, and obtaining property by false pretenses. The trial judge determined that the verdicts of misdemeanor breaking or entering and felony larceny were legally inconsistent and ordered further deliberations. The jury deliberated and found the defendant guilty of felony breaking or entering and felony larceny. (1) The court ruled that there was sufficient evidence to support the defendant's conviction of obtaining property by false pretenses by using stolen credit cards at the store. The court rejected the defendant's argument that the evidence was insufficient because the state did not present evidence of any verbal misrepresentations by the defendant. The state's evidence at trial included a videotape of the purchases by the defendant and her signed receipts. Verbal misrepresentations need not be proved; conduct alone is sufficient.

### **False Pretenses-Aiding and abetting-Private work by government employee**

*State v. Sink, 178 NCA 217 (2006)*

There was sufficient evidence to deny defendant's motion to dismiss the charge of aiding and abetting obtaining property by false pretenses based on a county worker performing a household repair for defendant, a county commissioner, on county time. Defendant's own statement and a prior bad act provided evidence from which intent and knowledge could be inferred.

## **Embezzlement--motion to dismiss--sufficiency of evidence**

*State v. Palmer, 175 NCA 208 (2005)*

The trial court erred by denying defendant's motions to dismiss embezzlement charges, because: (1) defendant never had lawful possession of the incoming checks at issue nor was she entrusted with the checks by virtue of a fiduciary capacity; (2) defendant acquired the incoming checks through misrepresentation by setting up a post office box, using another employee's name and signature, and directing incoming checks to that address without authorization; (3) even though defendant had access to all incoming checks for both companies, she was not authorized to direct incoming checks to the post office box she opened, nor was opening the mail or making out deposit slips for incoming checks one of defendant's duties; and (4) the appropriate charges against defendant should have been larceny.

## **False Pretense--misdemeanor failure to work after being paid--motion to dismiss--sufficiency of evidence**

*State v. Octetree, 173 NCA 228 (2005)*

The trial court did not err by failing to dismiss the charge of misdemeanor failure to work after being paid at the close of the State's evidence, because: (1) the evidence presented a question for the jury to resolve when the alleged victim testified that he gave defendant \$100 to buy supplies for a task defendant had agreed to perform and defendant testified that he never received the \$100 but refused to do the work because he had not been fully paid by the alleged victim for a previous job; and (2) even though the \$100 was intended for the purchase of materials, the State produced substantial evidence under N.C.G.S. § 14-104 that defendant obtained an advance of money, provisions, goods, wares or merchandise from the alleged victim on the false promise of completing the work.

## **Embezzlement--public officer--local ABC board employee--subject matter jurisdiction**

*State v. Jones, 172 NCA 161 (2005)*

The Court of Appeals concluded ex mero motu that the trial court lacked subject matter jurisdiction over defendant local ABC Board employee, and the judgments finding defendant guilty of ten counts of embezzlement by a public officer under N.C.G.S. § 14-92 are vacated, because: (1) the Asheville ABC is not a political subdivision of a city, county, or the Commission; (2) although defendant is an employee of a local ABC board and is subject to statutes that are applicable to a local ABC board's employees, defendant is not a public officer of any county, unit or agency of local government, or local board of education; and (3) as a local ABC Board employee, defendant should have been charged under N.C.G.S. § 14-90.

**False Pretense--attempting to obtain property by false pretenses--failure to include specific amount of currency--notice**

*State v. Ledwell, 171 NCA 314 (2005)*

The original and superseding indictments for attempting to obtain property by false pretenses were proper even though they did not include a specific amount of currency which defendant was alleged to have obtained, because: (1) N.C.G.S. § 14-100 states that any money obtained by false pretenses constitutes a violation of the statute and does not specify that the indictment must include the specific amount of money; and (2) the term "United States currency" is sufficient to describe the money and the inclusion of the watch band in the indictment provides defendant with notice of the crime of which he is accused.

**False Pretense--attempting to obtain property by false pretenses--motion to dismiss--sufficiency of evidence**

*State v. Ledwell, 171 NCA 314 (2005)*

The trial court did not err in an attempting to obtain property by false pretenses case by denying defendant's motions to dismiss based on an alleged variance

between the indictment and the proof presented by the State at trial concerning evidence of a statement that defendant was entitled to a refund for a watchband that defendant knew he had unlawfully taken, because: (1) representation of a false pretense need not come through spoken words, but instead may be by act or conduct; (2) the State presented testimony by witnesses that defendant represented in act and through words that he wanted a refund for the watch; and (3) a reasonable juror could conclude from the State's evidence that defendant represented that he was entitled to a refund.

### **False Pretense--attempting to obtain property by false pretenses--instructions--plain error analysis**

*State v. Ledwell, 171 NCA 314 (2005)*

The trial court did not commit plain error by instructing the jury regarding elements of attempting to obtain property by false pretenses even though defendant contends they were not specific to the misrepresentation alleged in the indictment, because: (1) the State presented evidence of a single misrepresentation from which a reasonable juror could infer defendant represented to the employee that he wanted a refund for the watch that defendant knew he had unlawfully taken; and (2) there is no other misrepresentation that the jury could have found and thus there was no need to instruct the jury on the specific misrepresentation.

### **Embezzlement--aiding and abetting--sufficiency of evidence**

*State v. Weaver, 359 NC 246 (2005)*

The trial court erred by denying defendant's motion to dismiss the charges of embezzlement and conspiracy to embezzle both based on the theory that defendant aided and abetted embezzlement committed by his former wife, because: (1) defendant cannot be convicted of aiding and abetting embezzlement without proof that an embezzlement was committed; (2) the lawful possession or control element of the crime of embezzlement was not satisfied when an administrative employee took a corporate signature stamp without permission and

wrote unauthorized corporate checks thereby misappropriating funds from her employer, and these facts appear to support the crime of larceny rather than embezzlement; (3) defendant's former wife was not her employer's agent and she never lawfully possessed the misappropriated funds; and (4) it is immaterial whether the former wife had actual or constructive possession of the misappropriated funds when her possession was not lawful, and thus, the crime of embezzlement has not occurred.

### **Credit Card Crimes—financial transaction card theft--no variance with proof**

*State v. Rawlins, 166 NCA 160 (2004)*

There was not a fatal variance between the indictment and the proof where defendant's indictment for unlawfully using another's credit cards included the allegation that he received the cards with the intent to use, sell and transfer them to another person, but the State did not present evidence that defendant transferred the cards to another person. There is not a fatal variance where an indictment charges the entire statute conjunctively and the State offers evidence supporting only one of the means by which the crime may have been committed.

### **Credit Card Crimes—single taking rule—not applicable**

*State v. Rawlins, 166 NCA 160 (2004)*

The "single taking" rule of common-law larceny (by which several items stolen in one act is a single offense) does not apply to financial transaction card theft. The statutory language is clear: taking, obtaining, or withholding a single card gives rise to a single count of financial transaction card theft. Therefore, two charges of financial transaction card theft were not duplicative where two different cards were obtained or withheld from the same person.

### **False Pretense—use of stolen credit cards—distinct transactions**

*State v. Rawlins, 166 NCA 160 (2004)*

Three indictments for obtaining property by false pretenses were not duplicative where they arose from one incident at one store involving the use of stolen credit cards. There were three distinct transactions separated by several minutes in which different cards were used.

### **Criminal Law—instructions—prima facie evidence**

*State v. Rawlins, 166 NCA 160 (2004)*

The trial court's instruction on prima facie evidence, considered as a whole, did not shift the burden of proof to a defendant charged with financial transaction card theft.

### **Embezzlement--fiduciary relationship--merchandise associate or store clerk--clothing store**

*State v. Robinson, 166 NCA 654 (2004)*

Assuming arguendo that the trial court erred in an embezzlement case by instructing the jury that by law a fiduciary relationship existed between a merchandise associate and the clothing store where she worked, the error was not prejudicial because: (1) N.C.G.S. § 14-90 specifically references clerks, and witnesses testified that a merchandise associate is the same as a store clerk; and (2) the jury could have found defendant guilty of embezzlement in her nonfiduciary capacity as a store clerk based on the State's presentation of the remaining elements of the crime.

### **Embezzlement--motion to dismiss--sufficiency of evidence**

*State v. Robinson, 166 NCA 654 (2004)*

The trial court did not err by denying defendant's motion to dismiss the charge of embezzlement, because the State provided substantial evidence that: (1) as a merchandise associate or sales clerk authorized to conduct sale transactions on behalf of the pertinent clothing company, defendant was an agent of the company; (2) pursuant to the terms of defendant's employment, she was to receive and did receive property belonging to the company; and (3) defendant knew that the merchandise was not hers, and converted it to her own use or fraudulently sold some of the merchandise. See *Farb* p. 12

### **False Pretense--felonious issuing of worthless checks--motion to dismiss--sufficiency of evidence**

*State v. Mucci, 163 NCA 615 (2004)*

The trial court did not err by denying defendant's motion to dismiss the charges of felonious issuing of worthless checks, because there was sufficient circumstantial evidence to infer that defendant knew that at the time he issued the checks they were worthless including that: (1) not only was there evidence that the checks had been issued with insufficient funds, but also that other checks issued within the same time period had been returned for insufficient funds; and (2) defendant actually requested the general manager of the payee to hold the checks and not deposit them immediately.

### **Embezzlement--aiding and abetting--motion to dismiss--sufficiency of evidence**

*State v. Weaver, 160 NCA 613 (2003)*

The trial court erred by denying defendant's motion to dismiss the charges of conspiracy to embezzle and embezzlement both based on the theory that defendant aided and abetted embezzlement committed by his former wife, because: (1) defendant cannot be convicted of aiding and abetting embezzlement without proof that an embezzlement was committed; (2) mere access to personal property will not satisfy the requirement that to be properly convicted of embezzlement, the accused must have received the property lawfully in the course of and under the terms of her employment; and (3) although defendant's former

wife misappropriated funds, the State failed to prove that she was guilty of embezzlement where there was no evidence from which the jury could find that she ever had lawful possession either of the blank checks that she forged (or of the U.S. currency deposits represented by the checking accounts) or of the signature stamp essential to make the checks negotiable when the evidence was uncontradicted that she had no general authority to write checks and had to obtain express permission regarding each individual check before she could fill it out.

### **Indictment and Information--obtaining property by false pretense--amendment to date of offense**

*State v. May, 159 NCA 159 (2003)*

The trial court did not commit plain error in an obtaining property by false pretense case by permitting the State to amend the date of offense on the indictment to accurately reflect the date of the offense rather than the date of arrest, because: (1) the date was not an essential element of the crime; and (2) the change in the date on the indictment did not affect defendant's planned defense.

### **Motor Vehicles--obtaining property by false pretense--driver's license**

*State v. May, 159 NCA 159 (2003)*

The trial court did not commit plain error in an obtaining property by false pretense case by entering judgment on the false pretense charge involving a driver's license, because an officer's testimony directly supported the indictment's allegation that defendant misrepresented both his identity and his name to an officer in order to procure a driver's license issued to defendant's alias.

### **Indictment and Information--motion to amend--date of charged offense**

*State v. Simpson, 159 NCA 435 (2003)*

The trial court did not err in an obtaining property by false pretenses case by granting the State's motion to amend the indictment to change the date of the charged offense, because: (1) the change did not substantially alter the charge; and (2) time was not of the essence. N.C.G.S. § 15A-923(e).

**False Pretense - obtaining property by false pretenses - deception of victim - sufficiency of evidence**

*State v. Simpson, 159 NCA 435 (2003)*

The trial court did not err by denying defendant's motion to dismiss the charges of obtaining property by false pretenses under N.C.G.S. § 14-100 even though defendant contends the victim pawn shop owner was not actually deceived by defendant's false representations, because although the victim had a suspicion that the cameras were stolen, his testimony when viewed in the light most favorable to the State reasonably permits a jury to make an inference that he called a detective in order to confirm that the items were not stolen property and that the victim was in fact deceived.

**Identity Fraud--financial identity fraud--motion to dismiss--sufficiency of evidence**

*State v. Dammons, 159 NCA 284 (2003)*

The trial court did not err by denying defendant's motion to dismiss the charge of financial identity fraud under N.C.G.S. § 14-113.20(a), because: (1) the indictment alleged that defendant misrepresented his identity for the purpose of avoiding legal consequences, and the State presented substantial evidence at trial tending to show that defendant assumed another person's identity without consent in order to avoid the trial of felony charges against him; and (2) the language of the indictment alleging that defendant also misrepresented his identity for the purposes of making a financial transaction was unnecessary and may properly be regarded as surplusage.

**Identity Fraud--financial identity fraud--obstructing or delaying a law enforcement officer LIO?**

*State v. Dammons, 159 NCA 284 (2003)*

The trial court did not err in a financial identity fraud case by failing to instruct the jury on obstructing and delaying an officer even though defendant contends it is a lesser-included offense of financial identity fraud, because obstructing or delaying a law enforcement officer is not a lesser-included offense of financial identity fraud since all of the elements of the offense of obstructing or delaying a law enforcement officer are not included in the offense of financial identity fraud.

**False Pretense--obtaining property--motion to dismiss--sufficiency of evidence**

*State v. Armstead, 149 NCA 652 (2002)*

The trial court did not err by denying defendant's motion to dismiss the charge of obtaining property by false pretenses even though defendant contends the indictment charged that defendant did obtain and attempt to obtain property by means of a false pretense which was "calculated to deceive and did deceive," when in fact defendant did not succeed in his attempt at deception, because the additional language in the indictment that defendant "did deceive" is surplusage and is not fatal to the indictment.

**False Pretense--obtaining property by false pretenses—deception**

*State v. Edwards, 150 NCA 544 (2002)*

The trial court did not err in an obtaining property by false pretenses case by excluding evidence elicited from a store owner on cross-examination that he was not deceived by the purchase order presented by defendant, because: (1) N.C.G.S. § 14-100 does not require that a particular person, such as the store owner, be deceived; and (2) the State established that defendant made a false representation with the intent to deceive, which did in fact deceive a store clerk.

## **False Pretense--false representation with intent to deceive--sufficiency of evidence**

*State v. Walston, 140 NC App 327 (2000)*

The trial court did not err by denying defendant pastor's motion to dismiss the charge of obtaining property by false pretenses under N.C.G.S. § 14-100 from a church even though defendant contends there was insufficient evidence to establish that defendant made a false representation with intent to deceive, because the evidence viewed in the light most favorable to the State reveals that: (1) defendant obtained a check on the church's account for one stated purpose and then used it for another purpose the very same day; (2) defendant set up a new account by using the check to transfer almost all of the church's money to an account for which he had sole access; (3) defendant failed to tell anyone at the church about the new account; (4) defendant transferred church funds to his own account to reimburse his own company and others for work on the church which the church had not authorized; and (5) defendant used the church's money to purchase items for his own use.

## **False Pretense--obtained anything of value as a result of a false representation-- sufficiency of evidence**

*State v. Walston, 140 NC App 327 (2000)*

The trial court did not err by denying defendant pastor's motion to dismiss the charge of obtaining property by false pretenses under N.C.G.S. § 14-100 from a church even though defendant contends there was insufficient evidence to establish that defendant obtained anything of value as a result of a false representation, because the evidence viewed in the light most favorable to the State reveals that: (1) defendant obtained, at least initially, sole access to \$10,000 of the church's funds as a result of his misrepresentation; and (2) although the church may have ultimately benefitted in the form of remodeling done on the church, defendant spent to benefit his own company and himself.

## **False Pretense--obtaining or attempting to obtain value from another--sufficiency of evidence**

*State v. Walston, 140 NC App 327 (2000)*

The trial court did not err by denying defendant pastor's motion to dismiss the charge of obtaining property by false pretenses under N.C.G.S. § 14-100 from a church even though defendant contends there was insufficient evidence to establish that defendant obtained or attempted to obtain value from another, because the evidence viewed in the light most favorable to the State reveals that: (1) defendant did receive value, which was the initial sole access to \$10,000 of the church's funds, and defendant did not have authorization from the church to use those funds; and (2) defendant did not set out any evidence that he acquired the \$10,000 lawfully and later converted it, and the State's evidence shows defendant actually unlawfully acquired the \$10,000 as a result of his false representation.

## **False Pretense--indictment--no fatal variance**

*State v. Walston, 140 NC App 327 (2000)*

The trial court did not err by denying defendant pastor's motion to dismiss the charge of obtaining property by false pretenses under N.C.G.S. § 14-100 from a church even though defendant contends there was a fatal variance between the indictment and the proof at trial based on the State's alleged failure to show that defendant obtained \$10,000 in U.S. currency or that he had sole access to the church's checking account, because: (1) it is not legally significant whether the thing gained by the party perpetrating the criminal act is in the same form as it was when taken by false pretense from the owner; and (2) the purported variance did not go to an essential element of the offense since whether defendant received \$10,000 in cash or deposited \$10,000 in a bank account, he obtained something of monetary value which is the crux of the offense.

## **False Pretenses, Cheats, and Related Offenses 7 (NCI4th) attempt to obtain money by false pretense no fatal variance between indictment and proof**

*State v. Rhome, 120 N.C. App. 278 (1995) \_\_\_ S.E.2d \_\_\_*

There was no fatal variance between the indictment and the evidence concerning a charge against a magistrate of obtaining property by false pretense in naming the wrong bank upon which the check in question was drawn since the name of the bank was surplusage not requiring proof; nor was there a fatal variance where the indictment charged defendant with an attempt to obtain money from a named victim but also alleged that funds paid in satisfaction of a worthless check came from the victim's mother, since the elements of the offense were satisfied by evidence tending to establish defendant's attempt to obtain money by false pretense from the person named in the indictment.

**False Pretenses, Cheats, and Related Offenses § 22 (NCI4th) - false representation – obtaining property - defendant's statements - sufficient evidence**

*State v. Saunders, 126 N.C. App. 524 (1997)*

There was sufficient evidence to support defendant's conviction for obtaining property by false pretenses where the element of false representation was proven by defendant's own testimony that he used the merchandise return voucher for items he had not actually purchased "and got other items in its place."

**False Pretenses, Cheats, and Related Offenses § 39 (NCI4th) - obtaining property by false pretenses - writing and passing a worthless check in exchange for property - sufficient**

*State v. Rogers, 346 N.C. 262 (1997)*

An unpublished opinion by the Court of Appeals was reversed where that opinion vacated judgments after concluding as a matter of law that a person cannot be prosecuted on an indictment for obtaining property by false pretenses where the indictment alleges nothing more than the defendant's passing of a worthless check in exchange for property. Writing and passing a worthless check in exchange for property, standing alone, is sufficient to uphold a conviction for obtaining property under false pretenses and language in *State v. Freeman, 308 N.C. 502*, is

disavowed and disapproved to the extent it may tend to indicate that an additional misrepresentation beyond the presentation of a worthless check in exchange for property is required to uphold a conviction for obtaining property by false pretenses in violation of N.C.G.S. § 14-100. In addition, *State v. Freeman*, 79 N.C. App. 177 and *State v. Hopkins*, 70 N.C. App. 530, are overruled insofar as they require proof of some additional misrepresentation beyond the presentation of a worthless check in such cases.

**False Pretenses, Cheats, and Related Offenses § 18 (NCI4th) - false pretense - sufficient evidence**

*State v. Barfield*, 127 N.C. App. 399 (1997)

The evidence was sufficient to support defendant's conviction of the crime of false pretense where it tended to show that defendant obtained money for a promise to move a house, did not move the house, and retained the money, and that defendant had contracted with two other persons to move their houses but failed to do so and did not return their money.

**Embezzlement § 27 (NCI4th) - sentencing - aggravating factor - violation of position of trust**

*State v. Mullaney*, 129 N.C. App. 506 (1998)

The trial court erred when sentencing defendant under the Fair Sentencing Act for embezzlement by finding as an aggravating factor that defendant violated a position of trust. Embezzlement necessarily involves a position of trust.

**Taxation - sales taxes - embezzlement - retailer as trustee**

*State v. Kennedy*, 130 N.C. App. 399 (1998)

The trial court in a criminal prosecution for embezzlement of sales and use taxes correctly charged the jury that a purchaser pays sales tax to a retailer as "trustee" for the State and county. While the collection of sales taxes by a retailer lacks some of the trappings of a traditional trust and while sales tax receipts are often commingled with other funds, the plain language of the relevant statutes provides that sales taxes are held by the retailer as "trustee for and on account of the State or county." N.C.G.S. § 105- 164.7, N.C.G.S. § 105-471.

### **Taxation - sales taxes - embezzlement - remedy**

*State v. Kennedy, 130 N.C. App. 399 (1998)*

The criminal and civil penalties of the Tax Code do not provide an exclusive remedy for embezzlement of sales taxes collected by the retailer.