

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e) (3) of the North Carolina Rules of Appellate Procedure.

NO. COA06-1698

NORTH CAROLINA COURT OF APPEALS

Filed: 2 October 2007

STATE OF NORTH CAROLINA

v.

Guilford County  
No. 05 CRS 101907

JERMARAE RASHAUN HERBERT,  
Defendant.

Appeal by defendant from judgment entered 5 July 2006 by Judge William Z. Wood, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 24 September 2007.

*Attorney General Roy Cooper, by Assistant Attorney General Heather H. Eisen, Attorney for the State.*

*Irving Joyner for defendant-appellant.*

BRYANT, Judge.

Jermarae Rashaun Herbert (defendant) appeals from his conviction by a jury for financial identity fraud pursuant to N.C. Gen. Stat. § 14-113.20. Defendant's sole argument on appeal is that the trial court erroneously denied his motion to dismiss on the grounds that the State failed to prove an element of the offense. Specifically, defendant asserts the State offered no evidence that defendant did not have the consent of the person whose identity he fraudulently used.

In support of his argument, defendant erroneously relies upon a prior version of N.C. Gen. Stat. § 14-113.20 and the cases

applying it. Although an earlier version of this statute required proof that the defendant acted without the consent of the person to whom the identity belonged, the North Carolina legislature removed this element from the statute in 2002. See Act of 31 October 2002, ch. 175, sec. 4, 2002 N.C. Sess. Laws 175. This amendment became effective on 1 December 2002 and was applicable to offenses committed on or after that date. *Id.* The offense date in the case *sub judice* was shown by the State's evidence to be 29 December 2005. Consequently, the State was not required to prove this element in defendant's case.

We recognize the indictments in this case contain the language of the earlier version of the statute including the consent requirement. However, prior to trial, the trial court allowed the State's motion to amend the indictments to remove the consent element with no objection from defendant. In fact, when the trial court asked defense counsel whether she had any objection to the amendment, counsel stated, "I agree that's not a matter they have to prove." Therefore, even if defendant's argument had any legal merit, it was unequivocally waived. Consequently, defendant's assignment of error is overruled.

No error.

Judges WYNN and ELMORE concur.

Report per Rule 30(e).