

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA09-332

NORTH CAROLINA COURT OF APPEALS

Filed: 17 November 2009

STATE OF NORTH CAROLINA

v.

Wake County
Nos. 07 CRS 57226
07 CRS 66575

ADAM WADE OWENS

Appeal by defendant from judgment entered 6 August 2008 by Judge James C. Spencer in Wake County Superior Court. Heard in the Court of Appeals 29 September 2009.

Attorney General Roy Cooper, by Agency Legal Specialist Lindsey L. Deere and Deputy Director, VCS section, Caroline Farmer, for the State.

William D. Spence, for defendant-appellant.

CALABRIA, Judge.

Adam Wade Owens ("defendant") appeals a judgment entered upon jury verdicts finding him guilty of felony forgery, attempted uttering of a forged paper, and attaining the status of an habitual felon. We find no error.

I. Facts

On 4 August 2007 defendant entered A.S.K. Check Cashing ("A.S.K.") in Raleigh, North Carolina. Defendant presented Abdul Bannaga Hafeez ("Hafeez"), a manager at A.S.K., a \$300.00 personal check made payable to defendant ("the check"). Since defendant previously cashed checks at A.S.K., his name, address, and photo

identification with defendant's signature were included in A.S.K.'s company database.

Per A.S.K. policy, Hafeez contacted the purported maker of the check, Eugene Venable Carver ("Carver"), to verify that he had written the check to defendant. Carver denied writing a check to defendant and asked Hafeez to hold the check so that he could retrieve it. Hafeez informed defendant that he would not honor the check and that it would be retained. Defendant then left A.S.K.

When Carver went to retrieve the check, he discovered that his backpack, which had contained a loose personal check, was missing from his motor vehicle. Carver then contacted the Raleigh Police Department ("the RPD") to report both the missing backpack and the situation with the check. Hafeez provided a copy of the check and defendant's personal information to the RPD.

Defendant was arrested, indicted, and subsequently tried in Wake County Superior Court for felony forgery, attempted uttering of a forged paper, breaking and entering of a motor vehicle, larceny, and attaining the status of an habitual felon. At the close of the State's evidence, defendant made a motion to dismiss for insufficiency of the evidence, which was denied by the trial court. Defendant did not present evidence. The jury returned verdicts of guilty to felony forgery, attempted uttering of a forged paper, and attaining the status of an habitual felon. The jury also returned verdicts of not guilty to breaking and entering of a motor vehicle and larceny. Defendant was sentenced to a

minimum term of 120 months to a maximum term of 153 months in the North Carolina Department of Correction. Defendant appeals.

II. Forgery

Defendant argues that the trial court erred by denying defendant's motion to dismiss the felony forgery charge. Defendant contends that the State's evidence was insufficient to establish every element of the crime. We disagree.

In ruling on a motion to dismiss. . . a trial court must determine whether there is substantial evidence of each essential element of the offenses charged. If, viewed in the light most favorable to the State, the evidence is such that a jury could reasonably infer that defendant is guilty, the motion must be denied.

State v. Williams, 154 N.C. App. 176, 178, 571 S.E.2d 619, 620-21 (2002) (citation omitted). "Circumstantial evidence, if sufficient to draw a reasonable inference of the defendant's guilt, should be submitted to the jury for determination of actual guilt." *State v. Wade*, 181 N.C. App. 295, 299, 639 S.E.2d 82, 86 (2007) (citation omitted).

There are three essential elements of forgery: "(1) There must be a false making or other alteration of some instrument in writing; (2) there must be a fraudulent intent; and (3) the instrument must be apparently capable of effecting a fraud." *State v. Welch*, 266 N.C. 291, 294, 145 S.E.2d 902, 905 (1966) (citations omitted). Additionally, "(w)hen one is found in the possession of a forged instrument and is endeavoring to obtain money or advances upon it, this raises a presumption that defendant either forged or consented to the forging such instrument, and nothing else

appearing the person would be presumed to be guilty." *Id.* at 295, 145 S.E.2d at 905 (citation omitted).

A. False Making

Defendant argues that the State's evidence was insufficient to prove the first element of forgery, a false making. Defendant argues that the *Welch* presumption is insufficient, without additional incriminating evidence, to send a forgery case to the jury. Defendant's argument is contrary to the explicit language of *Welch* ("nothing else appearing the person would be presumed to be guilty"), and our courts have never required additional evidence when the *Welch* presumption controls. *See, e.g., State v. Fleming*, 52 N.C. App. 563, 568, 279 S.E.2d 29, 32 (1981). Defendant's argument is without merit.

B. Authority

Defendant also argues that *State v. Sinclair* requires, in order to uphold a forgery conviction, proof that "not only that the signature in question is not genuine, but [that it] was made by defendant *without authority*." 45 N.C. App. 586, 590, 263 S.E.2d 811, 814 (citation omitted), *rev'd on other grounds*, 301 N.C. 193, 270 S.E.2d 418 (1980). Defendant contends that since the check was drawn on an account held jointly by Carver and his wife ("the account"), the State was required to provide proof that neither account holder authorized defendant to access the account.

Sinclair does not advance defendant's argument. In *Sinclair*, the joint account holder whose name had been forged repeatedly testified that the defendant had authority to withdraw funds from

the account in question. *Id.* at 591, 263 S.E.2d at 814. The State provided no substantive evidence that the defendant did not possess such authority. *Id.* at 590-92, 263 S.E.2d at 814-15. Since all the evidence indicated that the defendant was authorized to access the account in question, there could be no conviction for forgery. *Id.*

In the instant case, the State presented evidence that Carver, an authorized holder of the account, had neither signed nor given anyone the authority to sign the check, that Carver did not recognize the handwriting on the check as his wife's, and that defendant attempted to cash the check. This is sufficient circumstantial evidence to send a forgery charge to the jury. See *State v. Prince*, 49 N.C. App. 145, 148, 270 S.E.2d 521, 523 (1980).

C. Fatal Variance

Defendant also argues that there was a fatal variance between the indictment and the facts presented at trial. Defendant contends that because the indictment alleged that the account holder was Eugene V. Carver, when the evidence at trial indicated that the account was actually a joint account in the name of both Eugene V. Carver and Ann Green Carver, a fatal variance existed that required dismissal of the forgery charge. Defendant did not object to the indictment at trial, nor did he make a motion to dismiss at the close of evidence based on this purported fatal variance in the indictment.

"The issue of variance between the indictment and proof is properly raised by a motion to dismiss" and a defendant "waive[s]

his right to raise this issue by failing to raise the issue at trial." *State v. Baldwin*, 117 N.C. App. 713, 717, 453 S.E.2d 193, 195 (1995). Defendant, by not raising this variance claim in his motion to dismiss, has waived his right to have this Court consider his variance claim on appeal. See N.C.R. App. P. 10(b)(1) (2008).

III. Habitual Felon

____Defendant argues that the trial court erred in denying defendant's motion to dismiss the habitual felon charge. Defendant contends that the evidence was insufficient to establish that he had three prior felony convictions. We disagree.

"[I]n order to withstand defendant's motion to dismiss the habitual felon charge, the State ha[s] to present substantial evidence that defendant ha[s] three prior felony convictions." *State v. Lindsey*, 118 N.C. App. 549, 552-53, 455 S.E.2d 909, 911 (1995). "The original or certified copy of the court record, bearing the same name as that by which the defendant is charged, shall be prima facie evidence that the defendant named therein is the same as the defendant before the court, and shall be prima facie evidence of the facts set out therein." N.C. Gen. Stat. § 14-7.4 (2007).

In the instant case, the State submitted as evidence, without objection, three certified true copies of judgments and commitments for three prior felony convictions. Defendant argues that one of the judgments submitted was insufficient because it was signed by the presiding judge in the wrong location.

When appealing the use of a prior conviction
as a partial basis for a habitual felon

indictment, inquiries are permissible only to determine whether the State gave defendant proper notice that he was being prosecuted for some substantive felony as a recidivist Questioning the validity of the original conviction is an impermissible collateral attack.

State v. Creason, 123 N.C. App. 495, 500, 473 S.E.2d 771, 773 (1996) (internal citation omitted).

Creason only permits an inquiry to determine whether the State gave defendant proper notice that he was being prosecuted as a recidivist. In the instant case, defendant does not dispute he was given proper notice that he was being tried as an habitual felon. Defendant is not permitted to attack the validity of a prior conviction based upon a clerical error. This is an impermissible collateral attack. The State presented substantial evidence of defendant's three prior felony convictions and defendant's motion to dismiss was properly denied.

No error.

Judges WYNN and ELMORE concur.

Report per Rule 30(e).