

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA12-1462
NORTH CAROLINA COURT OF APPEALS

Filed: 3 September 2013

STATE OF NORTH CAROLINA

v.

Union County
Nos. 08 CRS 7494, 52528-29

LOUISE MIDDLETON BIVENS

On writ of certiorari to review judgment entered 15 December 2010 by Judge W. Erwin Spainhour in Union County Superior Court. Heard in the Court of Appeals 19 August 2013.

Attorney General Roy Cooper, by Assistant Attorney General Melody R. Hairston, for the State.

J. Edward Yeager, Jr., for Defendant.

DILLON, Judge.

A jury found Louise Middleton Bivens (Defendant) guilty of three counts of obtaining property by false pretenses based upon evidence that she received merchandise by passing a worthless check for \$310.52 at a Food Lion grocery store on 29 April 2008, and by passing two worthless checks for \$108.84 and \$259.12 at a Dollar General store on 6 May 2008. Defendant pled guilty to attaining habitual felon status, whereupon the trial court

consolidated her convictions for judgment and sentenced her to an active prison term of 117 to 150 months. This Court issued a writ of certiorari to review the judgment on 5 June 2012.

Defendant first argues that she received ineffective assistance of counsel ("IAC") at trial. In reviewing IAC claims, we employ the two-part test established in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984), and adopted for state constitutional purposes in *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985). To prevail, Defendant must show that (1) her counsel's performance fell "below an objective standard of reasonableness[,]" and (2) "there is 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Waring*, 364 N.C. 443, 502, 701 S.E.2d 615, 652 (2010) (quoting *Strickland*, 466 U.S. at 688, 694, 80 L. Ed. 2d at 693, 698), *cert. denied*, ___ U.S. ___, 181 L. Ed. 2d 53 (2011). This Court "need not determine whether counsel made errors if the record does not show a reasonable probability that a different verdict would have been reached in the absence of counsel's deficient performance." *State v. Banks*, 163 N.C. App. 31, 36, 591 S.E.2d 917, 921 (citing *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248-49).

Defendant faults her counsel for failing to make a motion to dismiss one of the three substantive charges at the conclusion of the evidence. Specifically, she asserts that the evidence was insufficient to establish her guilt of obtaining property by false pretenses from Food Lion on 29 April 2008. The State showed that Defendant purchased groceries with a check drawn on a bank account belonging to her daughter, Quwanda. The account had been opened on 10 April 2008 and closed on 14 April 2008 without ever being funded. Defendant gave a written statement to police admitting that she "made the check out" and "gave the clerk [the] check for \$310.52." She now contends, however, that the State failed to prove that she was the person who signed the check, that she represented herself as Quwanda, or that she intended to deceive Food Lion, or that Food Lion was actually deceived about her identity.

A motion to dismiss based on insufficient evidence is reviewed under the following legal standard:

The trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion. In considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the State and give the

State the benefit of every reasonable inference from the evidence.

State v. Parker, 354 N.C. 268, 278, 553 S.E.2d 885, 894 (2001) (citations and quotation marks omitted). As noted above, if this Court can determine that the trial court would have denied a motion to dismiss to the charge, Defendant's IAC claim fails under the *Strickland* standard for lack of prejudice. See generally *Banks*, 163 N.C. App. at 36, 591 S.E.2d at 921 (citing *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248-49).

Defendant's IAC claim is without merit. Our Supreme Court has held that "the writing and passing of a worthless check in exchange for property, standing alone, is sufficient to uphold a conviction for obtaining property under false pretenses." *State v. Rogers*, 346 N.C. 263, 263, 485 S.E.2d 619, 620 (1997). The Court in *Rogers* explicitly overruled prior decisions of this Court "insofar as they require[d] proof of some additional misrepresentation beyond the presentation of a worthless check[.]" *Id.* at 264, 485 S.E.2d at 621 (citations omitted). Therefore, the evidence that Defendant obtained groceries from Food Lion on 29 April 2008 by passing a worthless check on a closed account was sufficient to withstand a motion to dismiss. *State v. Cagle*, 182 N.C. App. 71, 75, 641 S.E.2d 705, 709

(2007). We thus find no reasonable probability of a different outcome at trial had counsel moved to dismiss the charge.

Defendant next asks this Court to review the sufficiency of the evidence regarding the 29 April 2008 charge pursuant to our discretionary authority "to prevent manifest injustice" under N.C.R. App. P. 2. Having found the State's evidence sufficient to sustain Defendant's conviction for this offense, we decline her invitation to invoke Rule 2.

In her remaining argument on appeal, Defendant asserts that the evidence does not support the amount of restitution awarded to Food Lion. Although she proposes a plain error standard of review for "a restitution order which was not objected to at trial[,] " this Court has held that "no objection is required to preserve for appellate review issues concerning the imposition of restitution." *State v. Smith*, 210 N.C. App. 439, 443, 707 S.E.2d 779, 782 (2011).

Our restitution statutes authorize restitution to "a person directly and proximately harmed as a result of *the defendant's commission of the criminal offense.*" N.C. Gen. Stat. § 15A-1340.34(a) (2011) (emphasis added). Absent a stipulation by the parties, the amount of the restitution award "must be supported by evidence adduced at trial or at sentencing." *State v.*

Wilson, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995). Neither a prosecutor's unsworn statement nor a restitution worksheet is sufficient to support a restitution award. See *State v. Mauer*, 202 N.C. App. 546, 552, 688 S.E.2d 774, 778 (2010); *State v. Calvino*, 179 N.C. App. 219, 223, 632 S.E.2d 839, 843 (2006).

The court awarded \$367.96 in restitution to Dollar General, representing the sum of the worthless checks passed by Defendant on 6 May 2008. The court awarded Food Lion restitution in the amount of \$369.23, exceeding by \$58.71 the worthless check passed by Defendant on 29 April 2008. It appears that Food Lion's restitution award includes the amount of a worthless check passed by Defendant's daughter-in-law, Simone, on 30 April 2008. The worksheet states that Defendant, Simone, and Quwanda are "jointly and severally liable" to Food Lion; it also identifies Simone and Quwanda as "other defendants" and assigns them file numbers 08 CRS 52656 and 52527. We note the State adduced evidence that Defendant was with Simone in Food Lion when she passed the worthless check on 30 April 2008, and a copy of Simone's check is included in the record on appeal. However, the judgment now before this Court does not reflect Defendant's conviction for any offense based on the 30 April 2008 incident. Nor are the proceedings in 08 CRS 52656, 52527 included in the

record on appeal. Defendant did not stipulate to the amount of restitution awarded to Food Lion.

“It is well settled that for an order of restitution to be valid, it must be related to the criminal act for which defendant was convicted[.]” *State v. Valladares*, 182 N.C. App. 525, 526, 642 S.E.2d 489, 491 (2007) (quoting *State v. Froneberger*, 81 N.C. App. 398, 404, 344 S.E.2d 344 (1986)). In the case *sub judice*, Defendant was not convicted of an offense involving the check passed by Simone on 30 April 2008. Moreover, the evidence tended to show that a Food Lion employee followed Simone into the parking lot and recovered the merchandise. Finally, we find no evidence of any additional loss to Food Lion beyond \$310.52 as a result of the check passed by Defendant on 29 April 2008. Accordingly, we “remand for the trial court to determine the amount of damage proximately caused by defendant’s conduct and to calculate the correct amount of restitution.” *State v. Moore*, 365 N.C. 283, 286, 715 S.E.2d 847, 849-50 (2011).

No error in part; vacated and remanded in part.

Judges GEER and ERVIN concur.

Report per Rule 30(e).