

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA13-613
NORTH CAROLINA COURT OF APPEALS

Filed: 19 November 2013

STATE OF NORTH CAROLINA

v.

Onslow County
No. 12CRS050214

EBONY ANGEL NICHOLAS
Defendant.

Appeal by defendant from judgment entered on or about 7 February 2013 by Judge W. Allen Cobb, Jr. in Superior Court, Onslow County. Heard in the Court of Appeals 5 November 2013.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Teresa L. Townsend, for the State.

Sue Genrich Berry for defendant-appellant.

STROUD, Judge.

Defendant appeals from a judgment entered upon her conviction for attempted obtaining property by false pretenses. We find no error.

The State's evidence at trial establishes the following factual background. On 14 December 2011, Elizabeth Mercado was working at a Walgreens Pharmacy in Jacksonville along with pharmacist Kaitlyn Galan. Ms. Mercado is a certified pharmacy

technician. On this date, in the afternoon or evening, a woman dropped off a prescription in the name of Ebony Nicholas at the drive-through window. Ms. Galan received it and scanned it into the computer, while Ms. Mercado was at the fill station approximately ten feet away. The prescription was for 120 tablets of 15 milligram oxycodone from Dr. Edwards at Women's Healthcare Associates, an Obstetrics and Gynecology practice. As Ms. Mercado began typing the information for the label, she noticed several abnormalities: (1) the prescription was missing the route of formulation, which tells the patient how the medication is taken; (2) Dr. Edward's signature, which is normally an "imperfect triangle," was straight-edged; and (3) it was unusual for this practice to prescribe oxycodone.

Ms. Mercado notified Ms. Galan of her concerns regarding the validity of the prescription, and they decided to verify it with the doctor's office. The woman who dropped off the prescription came back that same evening to pick it up, and the pharmacist explained that the prescription would have to be verified the next morning because it was missing some information. Ms. Mercado told police that the woman was African-American with blonde braids on top of dark hair.

The following evening, Ms. Mercado was again working at the fill station, when a similar prescription for Ebony Nicholas was dropped off by a different woman. This prescription contained a route of formulation, but otherwise raised the same concerns as the previous one. Ms. Mercado notified the pharmacist on duty, Michelle Baran, who also found the prescription suspicious, and she flagged it. When the woman returned to pick up the prescription, she told Ms. Mercado that she was not the patient and identified herself as Joesanna Friday.

Ms. Baran contacted Dr. Edward's office the next morning, and learned that the prescription had not been written by Dr. Edwards and was fraudulent. Ms. Baran also contacted Ebony Nicholas, based on information contained in Walgreens' computer system. Ms. Baran asked if Ms. Nicholas was aware that a prescription had been dropped off for her the previous night. She answered in the affirmative, and stated that her sister dropped it off. Ms. Baran told Ms. Nicholas that the prescription was invalid, and Ms. Nicholas indicated that she did not know what was going on.

Detective Tim Coltrane conducted a photo identification with Ms. Mercado at Walgreens on 26 December 2011. He brought two different sets of six color photographs. Detective Coltrane

knew the photo arrays contained two suspects in total, but he did not choose the photos himself, did not know who was considered a suspect, and had no other involvement in the case. Detective Coltrane instructed Ms. Mercado to respond, "yes, no, maybe" to each photo. Ms. Mercado responded with "maybe" to several photos in the first set. She responded with "no" to all of the photos in the second set. Detective Coltrane then went through the first set a second time, and Ms. Mercado responded with "yes" to one specific photo. The photograph Ms. Mercado positively identified was of defendant.

At the close of the State's evidence, defendant moved for dismissal of the charges, and the trial court denied her motion. Defendant renewed her motion at the close of all evidence, which the trial court again denied.

The jury found defendant guilty of attempting to obtain property by false pretenses and attempting to obtain a controlled substance by forgery, fraud, misrepresentation, or deception. The trial court arrested judgment on the latter charge, sentenced defendant to a suspended term of 6 to 17 months, and placed her on probation for 30 months. Defendant timely entered notice of appeal.

Defendant argues that the trial court erred by denying her motion to dismiss. “Upon defendant’s motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense. If so, the motion is properly denied.” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L.Ed. 2d 150 (2000). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). “In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L.Ed. 2d 818 (1995). “This Court reviews the trial court’s denial of a motion to dismiss *de novo*.” *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

Defendant contends that the State failed to present substantial evidence that she was the perpetrator of the crime. In support of her argument, defendant submits that there was no in-court identification of defendant, that Ms. Galan failed to identify defendant and did not testify, and that there was no circumstantial evidence linking her to the crime. Defendant also contends, for various reasons, that Ms. Mercado's identification should be discounted.

We are not persuaded. At trial, the State presented eyewitness testimony identifying defendant as the perpetrator. Ms. Mercado observed defendant on several occasions, described her to law enforcement, and identified her in a photo array less than two weeks after the incident. Additionally, as the State points out, Ms. Mercado quickly suspected the prescription to be fraudulent, thereby lending credence to her observation of the suspect. We find the foregoing evidence of identity sufficient to withstand a motion to dismiss. Furthermore, at least part of defendant's argument amounts to a credibility challenge, and it is well-established that "[a]lleged contradictions or issues of credibility are for [the] jury to resolve and do not warrant dismissal." *State v. Brown*, 177 N.C. App. 177, 187, 628 S.E.2d

787, 793 (2006) (citation omitted). Accordingly, the trial court did not err in denying defendant's motion to dismiss.

In her second argument, defendant contends that she was denied effective assistance of counsel in the event counsel did not properly preserve her challenge to the sufficiency of the evidence. Because we have concluded that the trial court did not err in this regard, we need not address defendant's second argument.

NO ERROR.

Judges CALABRIA and STEELMAN concur.

Report per Rule 30(e).