

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA13-70
NORTH CAROLINA COURT OF APPEALS

Filed: 3 September 2013

STATE OF NORTH CAROLINA

v.

Person County

Nos. 09 CRS 51021-23, 12 CRS 64

EARL LEE WILSON

Appeal by defendant from judgment entered 19 July 2012 by Judge W. Osmond Smith, III in Person County Superior Court. Heard in the Court of Appeals 19 August 2013.

Attorney General Roy Cooper, by Assistant Attorney General David D. Lennon, for the State.

Brock, Payne & Meece, P.A., by C. Scott Holmes, for defendant-appellant.

DILLON, Judge.

Earl Lee Wilson (Defendant) appeals from a judgment entered based upon jury verdicts finding him guilty of two counts each of identity theft, forgery, uttering, and obtaining property by false pretenses, and of having obtained the status of an habitual felon. At trial, the State's evidence tended to show that on 8 December 2008, a man cashed two checks totaling

\$34,444.61 at a check-cashing business in Person County run by Troy Gregory. The checks were made out to P & J Contracting Company, and the man told Gregory the checks were an insurance settlement from a wrecked truck. The man stated that he was Anthony Paylor, the "P" in P & J Contracting Company, and showed Gregory a state-issued identification card in the name of Anthony Paylor with his picture on it. The man endorsed the checks in Gregory's presence, signing the name "Anthony W. Paylor." However, the checks were not honored by the bank because they were reported missing by the person who was supposed to have received them. A subsequent investigation determined that Defendant was the man who cashed the checks while pretending to be Anthony Paylor. Defendant gave notice of appeal in open court.

We first address Defendant's argument that the trial court erred in denying his motion to dismiss the charges against him for insufficiency of the evidence. On appeal, Defendant argues the trial court erred in denying his motion because the State failed to present sufficient evidence that he acted without authority or consent. At trial, however, defense counsel argued the charges should be dismissed because the State presented insufficient evidence of defendant's identity as the perpetrator

of the crimes. It is well established that "where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts." *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (citations and quotation marks omitted). Moreover, a defendant waives review of his argument regarding the denial of a motion to dismiss when, on appeal, the "defendant presents a different theory to support his motion to dismiss than that he presented at trial[.]" *State v. Euceda-Valle*, 182 N.C. App. 268, 272, 641 S.E.2d 858, 862, *appeal dismissed, disc. review denied, and cert. denied*, 361 N.C. 698, 652 S.E.2d 923 (2007). Accordingly, defendant has waived review of this argument and it is dismissed.

Defendant also argues the trial court erred in admitting inadmissible hearsay evidence regarding the handling of the checks by the bank. At trial, Gregory testified:

. . . I got a call from my bank that said that the checks had been, that the person that was supposed to receive them hadn't got them. So, it ended up, he sued the insurance company for not sending the money. They sued the bank that was holding it. They held the money for three years. Finally, they turned it loose and gave it to the right people last year.

Defendant argues this testimony was admitted for the truth of the matter asserted and constitutes the only evidence that he was acting without authority from Anthony Paylor to endorse and cash the checks in Paylor's name. *See State v. Phillips*, 256 N.C. 445, 448, 124 S.E.2d 146, 148 (1962) (holding that to prove an alleged forgery where the forged signature is that of a genuine person, the State must show that the signature was made without the authorization of the person whose signature is written). We disagree.

Defendant concedes that he did not preserve this issue for review by objecting to the admission of the testimony at trial, and thus this issue is reviewed only for plain error. *State v. Lawrence*, 365 N.C. 506, 513, 723 S.E.2d 326, 331 (2012).

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice - that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.

Id. at 518, 723 S.E.2d at 334 (alteration in original) (citations and internal quotation marks omitted).

Here, there is no question as to whether Defendant was acting under any authorization from Paylor. Rather, Defendant affirmatively asserted that he was Paylor when he cashed the checks. Defendant told Gregory that he was Paylor, presented an identity card to Gregory that was issued in Paylor's name but bore Defendant's picture, and endorsed the checks in Paylor's name in Gregory's presence. Defendant's deception in this case is sufficient to establish that he was acting without Paylor's authorization when he endorsed and cashed the checks. Thus, even assuming it was error to admit Gregory's testimony into evidence, Defendant cannot show that such error was fundamental for purposes of the plain error standard of review, because the testimony was not the only evidence that Defendant acted without the authority or consent from Paylor when he committed these crimes. Accordingly, we overrule this argument and hold Defendant received a fair trial, free of prejudicial error.

No error.

Judges GEER and ERVIN concur.

Report per Rule 30(e).