An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-200

Filed: 17 April 2018

Lincoln County, No. 15CRS052067, 16CRS212

STATE OF NORTH CAROLINA

v.

KENNETH WAYNE RYCKELEY, Defendant.

Appeal by defendant from judgment entered on or about 29 September 2016 by Judge Eric L. Levinson in Superior Court, Lincoln County. Heard in the Court of Appeals 23 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General B. Carrington Skinner IV, for the State.

Joseph P. Lattimore, for defendant-appellant.

STROUD, Judge.

Defendant appeals judgment for obtaining property by false pretenses and attaining the status of habitual felon. We conclude there was no error.

I. Background

The State's evidence showed that on 1 May 2015, defendant "presented a check for $545" to the State Employees' Credit Union ("SECU"). SECU cashed the check,

and two days later the check was "returned for a closed account." Defendant was indicted for obtaining property by false pretenses. Defendant was tried by a jury and found guilty. Defendant then pled to attaining the status of a habitual felon. The trial court sentenced defendant, and defendant appeals.

II. Fatal Variance

Defendant challenges none of the underlying elements of obtaining property by false pretenses but contends only that the trial court erred in denying his motion to dismiss due to a fatal variance in the indictment. Defendant also contends that if this Court determines this issue was not properly preserved for appeal we should invoke Rule 2 and consider his argument to prevent manifest injustice or, in the alternative, his trial counsel provided ineffective assistance of counsel in failing to argue there was a fatal variance. Even if defendant had properly preserved this argument for appeal, we conclude there was no error in the trial court's denial of defendant's motion to dismiss.

"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).

> A variance occurs where the allegations in an indictment, although they may be sufficiently specific on their face, do not conform to the evidence actually established at trial. In order for a variance to warrant reversal, the variance must be material. A variance is not material, and is therefore not fatal, if it does not involve an essential element of the crime charged.

State v. Skinner, 162 N.C. App. 434, 445–46, 590 S.E.2d 876, 885 (2004) (citations and quotation marks omitted). "[A]llegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage[.]" *Id.* at 445, 590 S.E.2d at 885. (citation and quotation marks omitted).

The elements of obtaining property by false pretenses are

> (1) a false representation of a subsisting fact or a future fulfillment or event; (2) which is calculated and intended to deceive; (3) which in fact does deceive; and (4) by which one person obtains or attempts to obtain something of value from another.

State v. Parker, 354 N.C. 268, 283–84, 553 S.E.2d 885, 897 (2001) (citation omitted).

The indictment alleged defendant "unlawfully, willfully and feloniously did knowingly and designedly with intent to cheat and defraud obtain and attempt to obtain $545.00 in United States Currency[.]" The indictment further indicated the false pretense "which was calculated to deceive and did deceive" was that "defendant presented to North Carolina State Employees Credit Union, located in Denver, North Carolina, a stolen and forged check and received $545.00 in United States Currency in return for said check knowing that said check was fraudulently made."

Defendant specifically argues

> the trial court erred in failing to dismiss the charge of obtaining property by false pretenses where the indictment alleged . . . [defendant] induced the credit union to give him money by presenting a stolen and forged check, but the trial evidence showed the check was drawn from a closed account.

(Original in all caps.) Here, the indictment alleged that defendant (1) knew the check was fraudulently made, (2) "knowingly and designedly with intent to cheat and defraud" presented the check, (3) SECU did honor the check by (4) giving defendant the $545.00 from said check. *See generally id.* at 283–84, 553 S.E.2d at 897.

At trial, Deputy Oscar Calderon of the Lincoln County Sheriff's Department testified,

> On this date and time I responded to listed location in reference to a fraudulent check. Upon arrival I spoke to Ms. Jones, who advised Kenneth Ryckeley came in on May 11 and cashed a fraudulent check for $545. Mr. Ryckeley came back on May 19, 2015, and attempted to cash another check but was told by Ms. Jones it could not be cashed. Mr. Ryckeley stated that was fine and gave an explanation that did not make sense and left. Ms. Jones later found that Mr. Ryckeley had passed checks at three different branches.

The evidence at trial established the elements of obtaining property by false pretenses. *See generally id.* Though the indictment alleged the check was "stolen and forged[,]" that evidence was not an element of obtaining property by false pretenses, *see generally id.*, and thus was "irrelevant and may be treated as surplusage[.]" *Skinner*, 162 N.C. App. at 445, 590 S.E.2d at 885. We conclude there was no fatal variance. *Id.* at 162, N.C. App. at 446, 590 S.E.2d at 885. This argument is overruled.

III. Jury Instructions

Defendant next contends "because of the fatal variance, the trial court plainly

erred by instructing the jury that they could convict . . . [him] of obtaining property by false pretenses without specifying the representations set forth in the indictment." (Original in all caps.) In other words, defendant contends the trial court *had* to instruct the jury that the check was "stolen and forged" as stated in the indictment. As discussed above, there was no fatal variance. The trial court did not err in failing to instruct the jury on whether the check was "stolen or forged" as this was not an essential element of the crime charged. This argument is without merit.

IV. Conclusion

We conclude there was no error.

NO ERROR.

Judges ELMORE and TYSON concur.

Report per Rule 30(e).