An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA18-455

Filed: 15 January 2019

Cumberland County, No. 15 CRS 64194

STATE OF NORTH CAROLINA

v.

ROBERT EARL BURNEY, Defendant.

Appeal by Defendant from judgment entered 9 November 2017 by Judge Claire V. Hill in Cumberland County Superior Court. Heard in the Court of Appeals 20 December 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jasmine S. McGhee, for the State

Office of the Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Robert Earl Burney ("Defendant") appeals from judgment entered upon his conviction for being a sex offender illegally on premises and having attained habitual felon status. We find no error.

I. Factual and Procedural History

On 12 September 1994, Defendant was convicted of taking indecent liberties with a child. Defendant subsequently registered as a sexual offender on 25 February 1997. On 13 June 2017, Defendant was indicted on charges of being a sex offender illegally on premises and having attained habitual felon status.

Defendant was tried at the 3 July 2017 Criminal Session of Cumberland County Superior Court. Defendant was convicted by a jury of being a sex offender illegally on premises. *See* N.C. Gen. Stat. § 14-208.18(a) (2017). The trial court then proceeded to the habitual felon phase. During this phase, the State submitted a copy of an order of arrest, an indictment, transcript of plea, and judgment in 08 CRS 8506. These documents reflected Defendant was convicted on 14 October 2009 for failure to register as a sex offender. The documents were admitted into evidence.

At the conclusion of the State's evidence, Defendant moved to dismiss the habitual felon charge. The trial court denied Defendant's motion. Defendant declined to present any evidence. The trial court then inquired of Defendant whether he wished to testify. During the trial court's discussion with Defendant regarding whether he wished to testify, Defendant's trial counsel interjected, stating Defendant had concerns regarding "the legitimacy of some of the prior convictions" contained in the habitual felon indictment, and whether those concerns might be raised in a motion for appropriate relief. Counsel further stated he did not believe those issues could be raised at Defendant's trial. Counsel noted he had only been appointed for

the current trial, and he had not been appointed to represent Defendant in "collateral challenges to convictions outside of Cumberland County," and, therefore, it was not within the scope of his representation to pursue a motion for appropriate relief concerning Defendant's prior convictions. Defendant did not testify.

Defendant was convicted of having attained habitual felon status. The trial court sentenced Defendant to a term of 73 to 100 months imprisonment. Defendant appeals.

II. Standard of Review

> To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (citations and quotation marks omitted).

III. Analysis

Defendant's sole argument on appeal is that the indictment in 08 CRS 8506 was fatally defective, and his trial counsel was ineffective by failing to file a motion

for appropriate relief challenging Defendant's prior conviction. We are not persuaded.

Defendant contends his trial counsel should have challenged the indictment in 08 CRS 8506, preventing the State from utilizing the conviction for habitual felon purposes. Defendant argues his trial counsel was ineffective by failing to file a motion for appropriate relief. However, this Court has stated:

> 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) (emphasis added).

Here, counsel could not challenge the allegedly fatally defective indictment while representing Defendant against the habitual felon charge, because it would have been an impermissible collateral attack. *Id.* at 500, 473 S.E.2d at 773. Consequently, counsel's failure to challenge the indictment at Defendant's trial on the instant charges does not constitute deficient performance. We further conclude Defendant is precluded from attaching such an argument to the instant appeal by claiming counsel was ineffective by failing to file a motion for appropriate relief. Instead, should Defendant seek to challenge the indictment in 08 CRS 8506, he may

do so by filing a separate motion for appropriate relief with the trial court in that case.

We further note Defendant does not dispute he was given proper notice he was being tried as an habitual felon. The State presented substantial evidence of Defendant's three prior felony convictions, and Defendant's motion to dismiss was properly denied. Accordingly, we find no error.

IV. Conclusion

The State presented sufficient evidence of all elements of Defendant's charges, and the trial court did not err in denying Defendant's motion to dismiss. Further, Defendant's counsel's failure to challenge the 08 CRS 8506 did not constitute ineffective assistance of counsel, and an appropriate challenge would be in a separate motion for appropriate relief. Accordingly, we find no error.

NO ERROR.

Chief Judge McGEE and Judge INMAN concur.

Report per Rule 30(e).