

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL STEWART SPENCER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 42140

FILED

APR 13 2004

ORDER OF AFFIRMANCE

JANETTE N. BLOOM  
CLERK OF SUPREME COURT  
BY *J. R. [Signature]*  
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of obtaining property by false pretenses (count I), uttering a forged instrument (count II), theft (count III), and two counts of burglary (count IV-V). The district court sentenced appellant Michael Stewart Spencer to serve a prison term of 28 to 72 months for count I, a concurrent prison term of 18 to 48 months for count II, a concurrent prison term of 24 to 60 months for count III, and two concurrent prison terms of 48 to 120 months for counts IV-V.

Spencer first contends that his conviction should be reversed because the district court failed to conduct a sufficient canvass to determine whether he knowingly and voluntarily waived his right to testify. We conclude that Spencer's contention lacks merit.

This court has stated that "while it is good practice" for a trial court to advise a defendant about his constitutional right to testify, we have also held that such an advisement is not mandatory for purposes of a valid conviction.<sup>1</sup> In this case, the record reveals that the district court informed Spencer about his right to testify and Spencer acknowledged that he discussed whether he should testify with defense counsel. Our

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<sup>1</sup>Phillips v. State, 105 Nev. 631, 633, 782 P.2d 381, 382 (1989).

decision in Phillips v. State does not require anything more. Moreover, like the defendant in Phillips, there is no indication in the record that Spencer was coerced or misled into waiving his right to testify, nor is there any indication from Spencer that he wanted to testify.<sup>2</sup> Accordingly, we conclude that the district court did not err by failing to properly advise Spencer.

Spencer next contends that there was insufficient evidence presented to sustain his convictions for obtaining property by false pretenses and burglary. In particular, Spencer contends that there was no evidence presented that he intended to defraud the retailer when he wrote a check to pay for a power tool on March 5, 2003. Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.<sup>3</sup>

In particular, we note that Donald Dolliver, the owner of Industrial Equipment Repair, testified that on March 5, 2003, Spencer wrote him a check for approximately \$310.00 to pay for a cordless hammer drill. There were insufficient funds in Spencer's bank account to cover the check, and Spencer neither paid for nor returned the cordless hammer to Dolliver. According to a bank employee, who testified at trial, Spencer's checking account had been closed by the bank on February 24, 2003, and Spencer had been personally notified by telephone and also by mail that his account was closed. Additionally, a bank employee testified that the highest balance in Spencer's account at any given time was \$280.00.

Although Spencer alleges that he had no intent to defraud

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<sup>2</sup>See id.

<sup>3</sup>See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

because he was working and due to be paid the week he wrote the check, the jury could reasonably infer from the evidence presented that Spencer entered Industrial Equipment with the intent to defraud Dolliver of the power tool and obtained the tool under false pretenses by using a bank check from a closed account. It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.<sup>4</sup>

In a related argument, Spencer contends that there was insufficient evidence to support his convictions for uttering a forged instrument and burglary because there was no evidence that he knew that the check he presented to Dolliver, on March 11, 2003, to purchase a miter saw was forged. Again, our review of the record on appeal reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.

In particular, Dolliver testified that Spencer told him that he was purchasing the saw for a friend and presented him with a signed check from the account of Mark Humphreys. Dolliver, who by then was aware that there were insufficient funds to cover Spencer's previous check, contacted the police and attempted to stall Spencer. When the police arrived, Dolliver testified that Spencer attempted to flee, but was apprehended and arrested. Mark Humphreys also testified at trial, explaining that: (1) he had reported the check at issue stolen; (2) he did not know Spencer; and (3) he never authorized Spencer or anyone else to write a check for a miter saw.

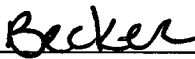
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<sup>4</sup>See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).


Although Spencer alleges that he did not know that the check was forged,<sup>5</sup> the jury could reasonably infer from the evidence presented that Spencer intended to, and did in fact, utter a forged instrument at the time he entered Industrial Equipment. It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.

Having considered Spencer's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.<sup>6</sup>

  
\_\_\_\_\_, J.  
Becker

  
\_\_\_\_\_, J.  
Agosti

  
\_\_\_\_\_, J.  
Gibbons

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<sup>5</sup>In particular, Spencer alleges that he was "conned by someone who stole the checks from the real Mr. Humphreys . . . then passed himself off to Mr. Spencer as the owner of the account."

<sup>6</sup>Because appellant is represented by counsel in this matter, we decline to grant appellant permission to file documents in proper person in this court. See NRAP 46(b). Accordingly, the clerk of this court shall return to appellant unfiled all proper person documents appellant has submitted to this court in this matter.

cc: Hon. James W. Hardesty, District Judge  
Washoe County Public Defender  
Attorney General Brian Sandoval/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk  
Michael Stewart Spencer