**Affirmed and Opinion filed May 25, 2000.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-98-01072-CR**

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**BRYAN KEITH SMITH, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 338th District Court**
**Harris County, Texas**
**Trial Court Cause No. 776, 796**

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## O P I N I O N

Bryan Keith Smith appeals his conviction for forgery by possessing counterfeit money with the intent to utter it. The jury assessed his punishment at 28 years imprisonment, enhanced by two prior felony convictions. In four points of error, appellant contends: (1) the trial court erred in denying appellant's motion for a directed verdict; (2) the evidence was insufficient to support his conviction; (3) the trial court erred in overruling appellant's objection to State's exhibit 1 (counterfeit money); and, (4) the trial court erred in denying appellant's motion for a motion for mistrial and/or request for the jury to disregard improper prosecutorial argument. We affirm.

On March 1, 1998, Phillip McDuell (McDuell) was working as a loss prevention investigator for a Fiesta grocery store in Houston, and was informed that appellant was attempting to pass a counterfeit $100.00 bill. McDuell pretended he was a customer, and he watched appellant give the clerk a counterfeit $100.00 bill to pay for a cell phone charger. Appellant walked out, and the clerk gave McDuell the counterfeit $100.00 bill given to her by appellant. McDuell immediately determined the bill was counterfeit because it did not have a water mark and a magnetic identification strip. McDuell stated that the water mark and the strip are inside the real bills and cannot be copied by laser printers. McDuell called Officer Norman Escobar for assistance, and they arrested appellant outside the store in his automobile.

Officer Escobar recovered six counterfeit $100.00 bills from appellant. Escobar flagged down Officer Marco Vela (Vela) who was on patrol at the time. Escobar turned the bills over to Vela, and Vela continued the investigation and wrote an offense report. Vela questioned appellant, and appellant admitted the bills were his. He told Vela his credit union gave him the bills. Vela told appellant that a credit union would not give him counterfeit bills, and appellant then said he might have acquired them while gambling. Vela identified the bills in court and stated he recognized them because they all had the same serial number, and one of the bills had been marked with a "counterfeit pen." The officer explained that a counterfeit pen is used to detect counterfeit bills by marking the bill, and if the pen mark turns yellow or a light color, it is a good bill. If the pen mark turns gray or dark color, the bill is suspected counterfeit. The bill appellant used to buy the cell phone charger had been marked with such a counterfeit pen, and the mark turned dark.

In point one, appellant contends the trial court erred in denying his motion for a directed verdict. In point two, appellant contends the evidence is legally insufficient to sustain his conviction because the indictment alleges he committed forgery by making and forgery by possession with the intent to pass.

The indictment charged appellant in pertinent part, as follows:

> . . . did then and there unlawfully, **with intent to defraud and harm, forge a writing** which purported to be the act of another who did not authorize that act, by possessing it with intent to utter it and while knowing it was forged, and the writing was money, namely, a counterfeit one hundred dollar Federal Reserve Note, Serial Number AL13537575B.

In both points of error, appellant contends the evidence is legally insufficient to support his conviction because the State did not prove that appellant committed forgery by making as well as forgery by possession with intent to pass. The standard of review applicable to a motion for directed verdict and a judgment notwithstanding the verdict is the same standard as that used in reviewing a challenge to the legal sufficiency of the evidence. *Havard v. State,* 800 S.W.2d 195, 199 (Tex.Crim.App.1989); *Serrano v. State*, 936 S.W.2d 387, (Tex.App.-Houston[14th Dist.] 1996, pet. ref'd). Appellant asserts that the indictment pleads both forgery by making and forgery by possession.

Appellant cites *Whetstone v. State,* 786 S.W.2d 361, 364 (Tex.Crim.App. 1990) as authority for the proposition that unnecessary matter that is descriptive of that which is legally essential to charge a crime is pleaded, then the unnecessary pleading must be proven as alleged. *Id*. The general rule is that allegations which are not essential to constitute the offense, and which might be entirely omitted without affecting the charge against the defendant, and without detriment to the indictment, are treated as mere surplusage. *Id*. Appellant concludes the indictment charges him with forgery by making in addition to forgery with the intent to utter, and therefore the State failed to prove he actually "forged" the counterfeit money somehow. Therefore, appellant concludes the evidence is legally insufficient to sustain his conviction for forgery. We disagree.

The indictment charges appellant with the offense of forgery by possession with intent to utter. The elements of forgery by possession with intent to utter are (1) a person (2) "forges" (3) a writing (4) within intent to defraud or harm (5) another. *Burks v. State,* 693 S.W.2d 932, 936 (Tex.Crim.App. 1985). In "possession" cases the term "forge" in § 32.21, Texas Penal Code, means "(C) to possess a writing that is forged within the meaning of Paragraph (A) with intent to utter it in a manner specified in Paragraph (B) of this subsection." *Id*. While evidence of a passing or attempted passing of a forged instrument would certainly aid a State's case of possessing a forged instrument, such evidence is not absolutely essential. *Id*.

While it is true that the State did not attempt to prove that any of the counterfeit bills were "made" by appellant, it should be remembered that in possession of forged instrument cases it is not required that

the accused forge the instrument to constitute the offense. *Id.* at page 938; *Fifer v. State*, 451 S.W.2d 757 (Tex.Crim.App.1970)

We find the indictment tracks the language of section 32.21 and sets out all the elements of the offense of possession with the intent to utter. Appellant does not challenge the sufficiency of the evidence to sustain his conviction for possession with the intent to utter, but only theorizes that the indictment somehow charges him with *both* the offense of forgery by making the counterfeit bills and forgery by possessing with the intent to utter. Appellant provides us with no argument as to how he concludes this from a reading of the indictment, and he cites no authority to support this allegation. Accordingly, appellant has not preserved this contention for review. TEX. R. APP. P. 38.1(h); *McFarland v. State*, 928 S.W.2d 482, 521 (Tex.Crim.App. 1996), *cert. denied*, 117 S.Ct. 966 (1997). In any case, the court of criminal appeals held that appellant did not have to "make" the counterfeit bills to constitute the offense of possession with the intent to utter. *Burks*, 693 S.W.2d at 938. Appellant's points of error one and two are overruled.

In point three, appellant contends the trial court erred when it overruled appellant's objection to the introduction of State's exhibit 1, the counterfeit bills. Appellant argues the State failed to lay a sufficient chain of custody predicate for the admission of this evidence.

Appellant purchased some items from Candida Barbosa, a clerk in the Fiesta Store with a one-hundred dollar bill. Ms. Barbosa put the bill in her cash register on top of some twenty-dollar bills. McDuell watched the transaction, came over to Ms. Barbosa, and told her to check the bill. Ms. Barbosa retrieved the bill and determined that it had no facial watermark and gave the bill to McDuell. McDuell also determined the bill was counterfeit because it did not have a facial watermark nor did it have the magnetic identification strip. McDuell testified that State's exhibit 1 consisted of the six counterfeit bills taken from appellant, all bearing the same serial number, and the one he passed to Ms. Barbosa had been marked by a counterfeit pen. McDuell turned the bills over to Officer Escobar, and Escobar testified he turned the bills over to Officer Vela. Officer Vela testified the bills were the same bills recovered from appellant, because they all had the same serial number. Officer Vela turned the bills over to the property room. The bills were returned to Officer Vela in a different envelope, but he testified the bills were the same bills he

took from appellant because they all had the same serial number and one bill had been marked with a counterfeit pen. Wayne Vitato, a special agent for the United States Secret Service, testified the envelope containing the bills was an evidence envelope from his office. Mr. Vitato testified the bills were counterfeit, and the first thing he observed was that all the bills had the same serial number. Mr. Vitato said the bills were missing the facial watermark of Benjamin Franklin and a synthetic band that runs from the top of the note to the bottom of the note identifying it's denomination. Mr. Vitato pointed out numerous other security features that were missing from the bills.

Officer Vela testified that the bills in State's exhibit 1 had the same serial numbers and were the same bills he retrieved from appellant at the Fiesta store. Appellant told Vela at the scene that he got the bills from his credit union. Vela told appellant that a credit union would not give him counterfeit bills, and appellant told Vela, ". . . maybe I got them from gambling." In *Alvarado v. State*, 912 S.W.2d 199, 313 (Tex.Crim.App. 1995), the court of criminal appeals found that the chain of custody of a bloodstained dollar bill found near the victim's body was sufficiently established by the testimony of the police officer at trial that the bill offered into evidence had the same serial number as the bill he found at the crime scene under rule 901(b)(1), Texas Rules of Evidence. *Id*. Rule 901(b)(1) states that the requirement of authentication or identification may be established by: "(1) *Testimony of witness with knowledge*. Testimony that a matter is what it is claimed to be." The court of criminal appeals found the dollar bill admissible "absent any showing by appellant of tampering or alteration." *Alvarado,* 912 S.W.2d at 313. Appellant presented no evidence of tampering or alteration of State's Exhibit 1. We find the chain of custody was sufficiently established by the State because appellant presented no evidence of tampering or alteration. We overrule appellant's point of error three.

In point four, appellant contends the trial court erred when it denied appellant's motion for a mistrial and/or request for jury to disregard the prosecutor's improper remarks during the punishment phase. During final argument, the record shows the following testimony:

> PROSECUTOR: Let's talk about this defendant. You saw in his pen packets that this isn't the first time he has been in trouble. It's pretty obvious from what we have in the evidence, but if you take a closer look at those pen packets, you will notice he was give probation, he was given an opportunity and he didn't fulfill that opportunity that people like you gave him before.

Also just back in January he was given probation once again, an opportunity–

APPELLANT'S COUNSEL: I object. That's totally outside the record. There's no evidence that supports that. I would ask the jury to be asked to disregard. I ask for a mistrial.

THE COURT: Ladies and gentlemen, you will consider the evidence that you have before you that has been introduced.

Appellant also complains of the following argument, objection, and ruling:

PROSECUTOR: Let's talk about what he has done in the last 10 years he's been an adult. They talk about, well, he's only 28. It's 10 years that he's been an adult. He's committed auto theft, which he was supposed to serve six years; criminal trespass; the theft; another auto theft; another carrying a weapon; failure to stop and give aid; deserted from the military--

APPELLANT'S COUNSEL: I object. There's no evidence to that. He's completely outside the record. I object. I ask the jury to be instructed to disregard and I ask for a mistrial again.

THE COURT: Ladies and gentlemen, as I instructed you when you were deliberating on guilt/innocence, you are the ones who heard the evidence, you heard the facts, and you remember it as you heard it and you can consider anything that's been introduced into evidence.

Although the judge did not give a clear instruction to disregard and did not rule on appellant's motion for a mistrial, appellant, apparently being satisfied, did not pursue his objection in order to obtain an adverse ruling. Where an adverse ruling is not obtained, nothing is preserved for review. *Flores v. State*, 871 S.W.2d 714, 723 (Tex.Crim.App. 1993). Appellant's point of error four is overruled.

The judgment of the trial court is affirmed.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed May 25, 2000.

Panel consists of Justices Draughn, Lee, and Hutson-Dunn.*

Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Joe L. Draughn, Norman Lee, and D. Camille Hutson-Dunn sitting by assignment.