COURT OF APPEALS OF VIRGINIA

Record No. 1022-25-2

MORSON LEE, JR.
v.
COMMONWEALTH OF VIRGINIA

Present: Judges Malveaux, Friedman and Bernhard

Argued at Richmond, Virginia

Opinion Issued September 8, 2026*

FROM THE CIRCUIT COURT OF MIDDLESEX COUNTY
Joshua P. Deford, Judge

Ivan D. Fehrenbach (Dansby & Fehrenbach, on briefs), for appellant.

Andrew T. Hull, Assistant Attorney General (Jason S. Miyares,[1] Attorney General, on brief), for appellee.

MEMORANDUM OPINION BY
JUDGE DAVID BERNHARD

Following a bench trial, the Circuit Court of Middlesex County convicted Morson Lee, Jr., of 37 offenses arising from his dealings with homeowners for whom he agreed to perform construction work under his brother's name.[2] Among them were convictions for forgery and

* This opinion is not designated for publication. *See* Code § 17.1-413(A).

[1] Jay C. Jones succeeded Jason S. Miyares as Attorney General on January 17, 2026.

[2] The circuit court's conviction order recites that the court reduced the charge in indictment number CR24000128-00 to a lesser-included misdemeanor, but it does not name that indictment among those on which the court found Lee guilty; that paragraph lists 36 case numbers. The amended conviction order, entered nunc pro tunc for the same date, is identical in this respect. The sentencing order lists CR24000128-00 among the misdemeanor offenses of which Lee was found guilty on January 15, 2025, and imposes a suspended 12-month term upon it. The circuit court, having ruled upon the motions to strike, found Lee guilty of "the remaining charges." We accordingly refer to 37 convictions.

uttering, in violation of Code § 18.2-172; construction fraud, in violation of Code § 18.2-200.1; and contracting without a license, in violation of Code § 54.1-1115. Lee challenges the sufficiency of the evidence supporting each of those groups of convictions.

He argues that the Commonwealth did not prove that he harbored a dishonest purpose when he signed his brother's name, that the documents he passed were consequently not forged, and that the Commonwealth likewise failed to prove the fraudulent intent that construction fraud requires. He argues as well that he needed no contractor's license for projects he says were worth no more than $1,000 and that no evidence tied him to a complainant's property on the date one indictment alleged. Lee concedes that all but two of these arguments were never made to the circuit court, and he asks us to reach them under the ends of justice exception to Rule 5A:18.

We affirm. The evidence, viewed as we must view it, permitted the circuit court to find that Lee assumed his brother's identity precisely so that homeowners who would otherwise have looked into his background would hire him and pay him in advance—a finding that defeats his preserved challenges to the forgery and construction fraud convictions. Lee also has not shown that the record affirmatively establishes the absence of an element on the remaining offenses, and the narrow ends of justice exception does not open the door to his unpreserved claims.

BACKGROUND

On appeal from a criminal conviction, we view the record in the light most favorable to the Commonwealth, the prevailing party at trial, and grant to it all reasonable inferences fairly deducible from the evidence. *See Goodwin v. Commonwealth*, 64 Va. App. 322, 324 (2015).

Lee held no contractor's license of any class. Beginning in October 2023, he approached homeowners in Middlesex County, identified himself as "Markus Lee"—the name of his brother—and offered, among other things, to repair or improve piers, docks, jetties, bulkheads, retaining walls, garages, and a pergola. He signed work agreements and presented other work documents in that name. He took cash advances. In most instances, he performed little or none of the promised work and did not return the money.

On or about October 20, 2023, Lee approached Ann Woodard at her home, identified himself as Markus Lee, and offered to repair a pier permanently attached to her property. Woodard, about to leave on vacation, paid him $1,000 in cash in advance for the pier repairs and, at his direction, purchased $863.04 in supplies for that job. She separately paid him $480 in cash to trim bushes at her business property. When she returned nearly a month later, the pier repairs had not been done, and the bushes were never trimmed. Woodard testified that she would not have paid Lee had she known he was using an alias. Months later, after she demanded a refund, Lee returned $500; at trial he still owed her $980.

Also in October, Lee identified himself to Karen Hall as Markus Lee and gave her a list of the work he would do bearing that name and a telephone number. Before agreeing, Hall searched a statewide criminal records system for the name, found no such person, and assumed on that basis that he had no criminal history. She then wrote up a contract, which Lee signed in his brother's name, and paid him $400. Lee did not perform as agreed; workers he sent did only part of the job; and his promises to return went unkept. He agreed to refund $300 but never did, and Hall's later calls reached a voicemail box that had never been set up. Hall testified that she would not have contracted with Lee had she known he was not Markus Lee.

In December, Lee, again identifying himself as Markus, proposed landscaping work and repairs to David Hodgkins's garage, jetties, retaining wall, and pergola. The two agreed to a series of projects, among them an $800 job, $200 of which was for repairing the pergola. That job did not remain an $800 job: the work changed, and on January 25, 2024, Hodgkins paid Lee an advance of $1,600 in labor to replace the pergola instead. Hodgkins ultimately paid Lee $10,900 for work Lee did not complete, and spent a further $10,409 of his own money on materials at Lee's direction. Between February and April, he kept a log of his attempts to reach Lee, many of which went unanswered. When Hodgkins's neighbor telephoned Lee, Lee said that he had been fishing, had not been busy, and could get to the neighbor's requested work immediately. Lee did not dispute owing Hodgkins money but said he first had to obtain the funds; no refund and no further work followed.

In January 2024, Lee, using the name Markus, gave Tom Haeseker a ballpark estimate of $25,000 for work on a dock. When Haeseker asked whether he had a marine contractor's license, Lee said that none was required for the work. Haeseker did not hire him.

In January, Hodgkins referred Michael Dongieux to Lee, who again used the name Markus and gave an estimate of $7,500 to replace a jetty and perform other work. Dongieux paid a deposit of $4,550 in cash and, at Lee's direction, spent $5,786.13 on lumber. Lee did not perform, met Dongieux's attempts to reach him with excuses, and did not refund the deposit as promised. Lee likewise offered to work on a pier on John Fulton's property, identified himself and signed an agreement using his brother's name, and took $450 in cash in advance for work he did not perform. Fulton also purchased $2,300 in supplies at Lee's direction. Fulton agreed to the work on January 5, 2024. After January 5, Lee never returned to the property. Fulton spoke with Lee by telephone several times over the months that followed and sent a demand letter on May 2, 2024.

In February 2024, Lee approached Donald Drayer with a list of work bearing his brother's name, contracted to repair a dock, signed the contract in that name, and took $720 in cash. Lee completed that work. Drayer and Lee later entered another agreement, and Drayer paid half of the cost of the job in advance. Lee never completed this work. Drayer asked for a refund of the advance, and Lee's wife paid back the money.

In the spring of 2024, Lee identified himself to Deborah Hagan as Markus, signed a contract in that name, and held himself out as a contractor. Sydney Norton, a co-owner of the property where Hagan resided, testified that Lee gave the name Markus and represented himself as a contractor, though not in those words. After an initial agreement for $800 of work in March of 2024, Hagan and Norton expanded the scope of Lee's project, and Hagan paid Lee a total of $5,375. Lee began but did not finish the work, offered excuses when Hagan contacted him, and returned only to remove materials.

In April 2024, Sergeant Cheek of the Middlesex County Sheriff's Office interviewed Lee, who admitted that he used the name Markus because of prior criminal charges. Lee does have a brother named Markus.

At the close of the Commonwealth's evidence, Lee moved to strike; he presented no evidence and incorporated his arguments in his renewed motion to strike. As to forgery, he argued that the evidence did not prove a dishonest purpose in his use of the alias and did not prove prejudice to anyone. As to uttering, he argued that the evidence did not show that he prepared or presented the documents. As to construction fraud and the licensing charges, he argued that the work did not involve structures permanently affixed to real property, that the evidence did not establish an intent to defraud, and that his several instances of unlicensed contracting amounted to a single continuing offense.

The circuit court granted the motions in part and otherwise denied them, finding that the piers, bulkheads, bulkhead crossties, and garage were permanently affixed to the properties and that the governing authority required only potential rather than actual prejudice. The circuit court also found that Lee had fraudulent intent when the agreements with the homeowners were made, resting that finding on Lee's use of his brother's name "because of previous charges," on his keeping up the ruse even after receiving the demand letters, and on his giving "a myriad of excuses” to all of the homeowners for why the work was not being done. The court convicted Lee of 37 offenses and, by final order entered May 22, 2025, sentenced him to 115 years and 228 months, suspending 103 years and 228 months. Thus, Lee was sentenced to a total of 12 years of active incarceration.

ANALYSIS

When we review the sufficiency of the evidence underlying a criminal conviction, our role is a limited one. *Commonwealth v. Garrick*, 303 Va. 176, 182 (2024). “[W]e review factfinding with the highest degree of appellate deference,” *Commonwealth v. Barney*, 302 Va. 84, 96 (2023) (quoting *Bowman v. Commonwealth*, 290 Va. 492, 496 (2015)), asking only whether, after reviewing the evidence in the light most favorable to the prosecution, “*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Garrick*, 303 Va. at 182 (quoting *Barney*, 302 Va. at 97). “[I]t is not for this [C]ourt to say that the evidence does or does not establish . . . guilt beyond a reasonable doubt [merely] because as an original proposition [we] might have reached a different conclusion.” *Barney*, 302 Va. at 97 (second alteration in original) (quoting *Cobb v. Commonwealth*, 152 Va. 941, 953 (1929)). The factfinder decides “which reasonable inferences should be drawn from the evidence, and whether to reject as unreasonable the hypotheses of innocence advanced by a defendant.” *Commonwealth v. Moseley*, 293 Va. 455, 464 (2017).

Three of Lee’s five assignments of error rest on arguments he never made to the circuit court, and he does not contend otherwise. Rule 5A:18 provides that “[n]o ruling of the trial court . . . will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice.” This Court will not consider an argument raised for the first time on appeal. *Ohree v. Commonwealth*, 26 Va. App. 299, 308 (1998). Lee invokes the ends of justice exception. That exception is narrow, "is to be used sparingly," and reaches only error that is "clear, substantial and material." *Redman v. Commonwealth*, 25 Va. App. 215, 220-21 (1997) (quoting *Brown v. Commonwealth*, 8 Va. App. 126, 132 (1989)).

An appellant who invokes the exception must satisfy two distinct requirements: (1) that the circuit court erred, and (2) "that a grave or manifest injustice will occur or [that he] will be denied essential rights." *Brittle v. Commonwealth*, 54 Va. App. 505, 513 (2009); *accord Commonwealth v. Bass*, 292 Va. 19, 27 (2016). "The burden of establishing a manifest injustice is a heavy one, and it rests with the appellant." *Holt v. Commonwealth*, 66 Va. App. 199, 210 (2016) (en banc) (quoting *Brittle*, 54 Va. App. at 514). It does not suffice to "show that the Commonwealth *failed* to prove an element . . . of the offense"; the appellant must show that he was "convicted for conduct that was not a criminal offense or the record must affirmatively prove that an element of the offense did not occur." *Redman*, 25 Va. App. at 221-22.

I. The Forgery Convictions

Forgery is "the false making or materially altering with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of legal liability." *Fitzgerald v. Commonwealth*, 227 Va. 171, 173 (1984) (quoting *Bullock v. Commonwealth*, 205 Va. 558, 561 (1964)); *see* Code § 18.2-172. Lee challenges only the element of fraudulent intent. This Court has defined an intent to defraud "as acting 'with an evil intent, or with the specific intent to deceive or trick.'" *Beshah v. Commonwealth*, 60 Va. App. 161, 170 (2012) (quoting *Burrell v. Commonwealth*, 50 Va. App. 72, 86 (2007)). Such intent "may, and often must, be inferred from the facts and circumstances in a particular case," including the conduct and representations of the accused. *Id.* (quoting *Burrell*, 50 Va. App. at 86). Because forgery consists of the false making of a writing *with* intent to defraud, that intent must attend the making.

The circuit court could reasonably find such intent on this record. Lee did not adopt a nickname or a trade name. He appropriated the identity of a living person—his own brother—and he told Sergeant Cheek why he had done it: because of his prior criminal charges. That admission supplies the link between the false signature and the advances he received. For example, Hall searched a statewide criminal records system for Markus Lee, found nothing, and paid Lee on the strength of the assumption that he had no criminal history. Hall testified that she would not have contracted with him had she known he was using an alias, and Woodard said the same of paying him. A factfinder could conclude from that evidence that Lee signed his brother's name not to spare himself embarrassment but to defeat the very inquiry that would have cost him the work and the advances.

Nor did the deception stop at the signature. Lee assured almost all of the homeowners that he would return and complete work he had abandoned. Lee also gave the homeowners with whom he contracted a variety of excuses for why the work was not being done. He told Hagan that he was a contractor who did dock and bulkhead work. He signed a series of agreements and other work documents using his brother's name. The repetition of the false signature across many transactions is itself circumstantial evidence of a fraudulent purpose rather than of an isolated event. *Cf. Beshah*, 60 Va. App. at 170 (treating the sheer number of an appellant's false entries, which indicated "a pattern of behavior to misrepresent the status of the patient's treatment and medication," as evidence of fraudulent intent).[3]

[3] In his reply brief Lee argues for the first time that Code § 18.2-172.2, which makes it a Class 1 misdemeanor maliciously to affix a facsimile or likeness of another person's signature to a writing without permission and "with the intent to create the false impression that the writing was signed by that person," is a specific statute that ought to govern his conduct, rather than the general forgery statute. That argument is not before us. It was not presented to the circuit court, *see* Rule 5A:18; it is not encompassed within any assignment of error, *see Moison v. Commonwealth*, 302 Va. 417, 420 (2023); and it appears for the first time in a reply brief. We express no view upon its merits.

Lee answers that these facts are equally consistent with innocence: that he was an inept and overextended contractor rather than a thief, and that a man bent on fraud would have taken the much larger sum of money for materials, spared himself the expense of workers, and disappeared. He points to the work he did complete, to the money repaid to Drayer and to Woodard, and to the homeowners who enlarged his scope of work after seeing the work he had done. Lee also points to the fact that he provided the homeowners with his correct phone number and that he talked to them, sometimes repeatedly. But whether an alternate hypothesis of innocence is reasonable is a question for the factfinder, and the circuit court was entitled to reject this one. *See Moseley*, 293 Va. at 464. The court could reasonably conclude that a contractor who intends to defraud may nonetheless perform some work and that returning part of one advance to some homeowners does not negate an intent to defraud as to the others. *Cf. Beshah*, 60 Va. App. at 171 (rejecting the contention that an appellant lacked an intent to defraud because she received no benefit from her conduct where it was reasonable to conclude "appellant received the benefit of being paid for work she did not perform and that she benefitted from masking her dereliction of duty"). Moreover, because the intent to defraud must attend the making of the writing itself, work performed or money repaid afterward does not negate it.

Lee's remaining suggestion—that using a brother's name to purge an unwanted criminal history is tantamount to concealing a regrettable tattoo—does not fit the record. A tattoo is not displayed to a homeowner who is deciding whether to hand over cash, nor is a tattoo typically relevant to transactions of the type Lee engaged in. Lee's false name, however, was displayed and relevant, particularly for the making of the work documents.

II. The Uttering Convictions

Code § 18.2-172 prohibits two distinct offenses: forging a writing to the prejudice of another's right, and uttering, or attempting to employ as true, such a forged writing, knowing it to be forged. To utter is to make "an assertion by word or action that a writing known to be forged is good and valid." *Bateman v. Commonwealth*, 205 Va. 595, 600 (1964). The assertion may be made by conduct: signing a false name to a document and handing it back to the person who will rely upon it asserts that the false signature is genuine and that the forged document is "good and valid." *See Goodwin*, 64 Va. App. at 330-31 (so holding as to the parallel prohibition in Code § 18.2-168).

Lee's challenge to the uttering convictions rests entirely on his challenge to the forgery convictions. He does not dispute that he signed the documents and passed them to the homeowners. He argues only that the documents were not forged, because he lacked fraudulent intent in signing them. He acknowledges that he did not make that argument below and asks us to reach it under the ends of justice exception. We need not decide whether the exception could reach a claim resting wholly on an argument we have already rejected, because the first of its two requirements is not met. *See Bass*, 292 Va. at 27. For the reasons already given, the evidence sufficed to prove that Lee signed the documents with an intent to defraud. The documents were therefore forged, and the premise of the argument as to the uttering charges fails. There being no error, there is no injustice to remedy.

III. The Felony Construction Fraud Convictions

Code § 18.2-200.1 provides that it is larceny to obtain an advance of money from another, with fraudulent intent, "upon a promise to perform construction, removal, repair or improvement of any building or structure permanently annexed to real property, or any other improvements to such real property," and then to "fail or refuse to perform such promise, and also fail to substantially make good such advance," where the defendant does not return the advance within 15 days of a request sent by certified mail. The offense comprises five elements: "(1) obtaining an advance of money from another person, (2) a fraudulent intent at the time the advance is obtained, (3) a promise to perform construction or improvement involving real property, (4) a failure to perform the promise, and (5) a failure to return the advance" within the statutory period. *Klink v. Commonwealth*, 12 Va. App. 815, 818 (1991). Lee challenges only the second element.

"The intent must exist at the time the contractor procured the advance." *Dennos v. Commonwealth*, 63 Va. App. 139, 145 (2014). "Circumstances implying fraudulent intent include" false statements by the contractor, his "subsequent failure to perform the work," his "failure to use the advanced funds to purchase supplies or to hire needed labor," his "efforts to avoid communicating with the homeowner," and his "refusal to return the advanced funds." *Id.* at 145-46. Each of those five circumstances appears here.

First, Lee made false statements. He introduced himself to Hagan, Norton, Dongieux, and Hodgkins using his brother's name and contracted in that name. "The use of false statements to induce a victim to enter into a contract is persuasive evidence supporting a finding of a fraudulent intent." *Klink*, 12 Va. App. at 819.

Second, Lee failed to perform. He did little or none of the work for Hagan, Dongieux, and Hodgkins after taking their money. That he completed some work for some homeowners does not assist him, because construction fraud can occur even though the contractor begins to perform on the contract; the relevant question is whether he obtained an advance upon a promise of future work "with a fraudulent intent not to perform or to perform only partially." *Rader v. Commonwealth*, 15 Va. App. 325, 332 (1992). Neither do his repeated assurances that he would return or that he would refund the advances assist him, because "a promise to do something in the future is not the equivalent of 'substantially mak[ing] good such advance.'" *Norman v. Commonwealth*, 2 Va. App. 518, 522 (1986) (alteration in original) (quoting Code § 18.2-200.1).

Third, Lee did not use the advances for the jobs. Rather than spend what he was given on materials or to hire additional workers, he directed many of the homeowners to buy the materials themselves, over and above what they had already paid him. For example, Hodgkins spent \$10,409 and Dongieux spent \$5,786.13 on materials and supplies in addition to the advances.

Fourth, Lee avoided the homeowners. For example, Hodgkins kept a log of numerous unanswered calls over a two-month period. Hagan, Hodgkins, and Dongieux were met with excuses for why the work was not complete.

Fifth, Lee did not return advances: Hodgkins's \$10,900, Dongieux's \$4,550, and Hagan's \$5,375 were never repaid.

Lee relies on *Klink*, in which this Court found the evidence insufficient for a finding of fraudulent intent although the contractor had performed almost none of the work. But the contractor in *Klink* made no false statements to induce the contract, and his failure to perform or to return the advance "was equally likely to have been caused by" poor management or financial distress. 12 Va. App. at 819. This record differs in the one respect that matters. Lee did not merely run out of money; he obtained the money in the first place by holding himself out as another man, and he told the investigating officer that he did so because of his criminal history. A factfinder could infer from this the fraudulent intent that was absent in *Klink*.

IV. The Convictions for Contracting Without a License

Lee's final two assignments of error challenge misdemeanor convictions for contracting without a license. It is a Class 1 misdemeanor to contract for, or bid upon, "the construction, removal, repair[,] or improvements" of "real property owned, controlled[,] or leased by another person without a license or certificate, or without the proper class of license . . . for the value of work to be performed." Code § 54.1-1115(A)(1). It is likewise unlawful to undertake such work without a valid license when this chapter requires one, or without "the proper class of license as defined in § 54.1-1100 for the work undertaken." Code § 54.1-1115(B). "No person [may] engage in, or offer to engage in, contracting work in the Commonwealth unless he has been licensed under the provisions of this chapter." Code § 54.1-1103(A). The class of license required turns on the value of the work. As relevant here, "'Class C contractors' perform or manage construction, removal, repair, or improvements when (i) the total value referred to in a single contract or project is over $1,000 but less than $10,000," or when "(ii) the total value of all such . . . [work] undertaken by such person within any 12-month period is less than $150,000." Code § 54.1-1100.[4] Value is defined as fair market value, and where "improvements are performed or supervised by a contractor, the contract price [is] prima facie evidence of value." *Id.*

A. The Value of the Work

Lee argues that he needed no license for three of the charged projects because their value did not exceed $1,000: two involving Woodard (indictment numbers CR24000129-00 and CR24000130-00) and one involving Hodgkins (indictment number CR24000114-00). The argument he made below was a different one. There he contended that the work did not involve structures permanently affixed to real property and, as to Hodgkins, that his several instances of unlicensed contracting were a single continuing offense. Rule 5A:18 therefore bars the argument he makes now, and the ends of justice exception does not rescue it.

The exception is not applicable, because the record does not affirmatively prove the fact on which the argument depends. As to Woodard, the $1,000 she paid in cash was not the value of the project. At Lee's direction, she also purchased $863.04 in supplies for the same pier

[4] The General Assembly amended these definitions after the conduct charged in this case, raising the license threshold amounts. *See* 2025 Va. Acts chs. 127, 133 (effective July 1, 2025). Unless otherwise noted, all references in this opinion to Code § 54.1-1100 are to the version in effect in 2023 and 2024, when the charged offenses occurred. Both parties quote the current version in their briefs.

repair. Because value under the chapter means fair market value, and the contract price is only prima facie evidence of it, the circuit court was not obliged to treat $1,000 as a ceiling. Code § 54.1-1100. As to Hodgkins, the indictment charged contracting or bidding on or about December 30, 2023, and the $800 figure on which Lee relies is the price the parties set for that work. The record also shows that the parties did not treat that price as fixed: the $800 job included $200 for repairing the pergola, and on January 25, 2024, Hodgkins advanced Lee $1,600 in labor to replace the pergola instead. A contract price is evidence of fair market value but is not conclusive of it, and Lee has not shown that the record affirmatively establishes that the fair market value of the work contracted for was $1,000 or less. A further reason bars the challenge to indictment number CR24000114-00: the circuit court stated no ruling on the motion to strike it. Where a party fails to obtain a ruling on a matter presented to the circuit court, there is no ruling for this Court to review. *Bethea v. Commonwealth*, 68 Va. App. 487, 498 (2018), *aff'd*, 297 Va. 730 (2019).

B. The Alleged Offense Date

Lee's fifth assignment of error concerns indictment number CR24000057-00, which charged that he undertook work for John Fulton without a license on or about March 8, 2024. He contends that no evidence placed him at Fulton's property on that date—Fulton testified that after their dealings in January 2024 Lee never came back—and that the record therefore establishes his innocence. Below, however, Lee argued something else: that the work for Fulton did not involve structures permanently affixed to real property. The argument he presses now is new, and Rule 5A:18 bars it unless the ends of justice exception applies.

It does not. An indictment is not to be quashed or deemed invalid for "omitting to state, or stating imperfectly, the time at which the offense was committed when time is not the essence of the offense." Code § 19.2-226(6). The Commonwealth may accordingly "charge that an offense occurred on a non-specific date or prove a date other than that alleged, if the date is not of the essence of the offense or not shown to be significant." *Marlowe v. Commonwealth*, 2 Va. App. 619, 622 (1986). Nothing about contracting without a license makes March 8, 2024, of the essence, and the indictment alleged that date only as an approximation. That latitude reaches the date; it does not relieve the Commonwealth of proving that the offense occurred.

The record does not carry Lee that far. Fulton testified that Lee came to his property on January 5, 2024, took up 12 or 15 deck boards, and broke a pole. The circuit court read the testimony the same way, confirming that Lee "did start on January 5th," "broke something," and "didn't finish." That is work undertaken upon Fulton's property, and Lee held no contractor's license of any class. The record thus establishes that the offense occurred; what it does not establish is that it occurred on March 8, 2024.

That Lee also stands convicted, upon indictment number CR24000053-00, of contracting or bidding for that work without a license does not alter the analysis. That indictment charged a violation of Code § 54.1-1115(A)(1); indictment number CR24000057-00 charged a violation of Code § 54.1-1115(B). Bidding or contracting for work and undertaking it are separate acts, and the subsections define separate offenses. Lee assigns no error to his conviction upon both.

The record does not "affirmatively prove that an element of the offense did not occur." *Redman*, 25 Va. App. at 222. Lee has therefore not shown error, the first requirement of the exception is not met, and we do not reach the second. *See Bass*, 292 Va. at 27. The nature of the claim confirms that result. The question of a variance between an indictment and the proof offered at trial is subject to the contemporaneous objection rule. *Id.* at 27 n.4. Lee made no such objection, and he identifies nothing beyond the variance itself to support applying the exception. Lee's conviction upon indictment number CR24000057-00 must therefore be sustained. We express no view upon the unit of prosecution under Code § 54.1-1115.

CONCLUSION

The evidence supported the circuit court's findings that Lee signed his brother's name in order to induce homeowners to hire him and to advance him money and that he took those advances intending not to perform. His remaining arguments were not made below, and he has not shown the clear, substantial, and material error, and the consequent grave injustice, that the ends of justice exception requires. Accordingly, we affirm the judgment of the circuit court.

Affirmed.