

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CHAMPAIGN COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 08-CA-26
Plaintiff-Appellee	:	
	:	Trial Court Case No. 07-CR-318
v.	:	
	:	(Criminal Appeal from
KELLEEE MURLEY	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 4th day of December, 2009.

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BROGAN, J.

{¶ 1} This case is before the court on Kellee Murley’s appeal from her conviction and from the trial court’s decision overruling her motion for a new trial based on newly discovered evidence. We will affirm.

{¶ 2} When Murley moved back to Springfield, Ohio, located in Clark County, in 2006, she had no job, or much of anything, so she sought social assistance from the Clark County Department of Job and Family Services (which we will refer to as Clark County). She applied for and began receiving cash assistance, medical assistance, and food stamps. Sometime in late 2006 or early 2007 (the record is not clear when) Murley moved to Urbana, Ohio, which is in Champaign County. Because Murley was no longer eligible for assistance from Clark County, in March 2007, she sought similar assistance from the Champaign County Department of Job and Family Services (or, as we will refer to it, Champaign County). On her application for assistance and in her interview for the same, Murley told and indicated to Champaign County that she was unemployed and received no income. Based on her statements, Champaign County began providing her with the assistance she requested. Later that year, an investigation by Champaign County revealed that Murley had been gainfully employed at Cambridge Home Healthcare since January 2007 and consistently earned an income each month that made her ineligible for cash assistance and food stamps throughout the time she received them. Murley subsequently repaid all the money for which she was ineligible.

{¶ 3} Nevertheless, the county decided to prosecute Murley, and a grand jury indicted her in October 2007 on one count of illegal use of food stamps, one count of theft, and one count of falsification in a theft offense. Murley defended herself by claiming that she believed Champaign County knew that she was employed so she had no motive to lie. Murley said she believed that Clark County, when it transferred her case to Champaign County, sent her entire case file. And because she had told

Clark County in November 2006 that she had a job at Cambridge Home Healthcare, which Clark County had verified, it was unnecessary for her to tell Champaign County what it already knew. When, on the application and in the interview, she said and indicated she had no income, Murley explained, she had simply misunderstood the questions. A jury did not believe her, and returned three verdicts of guilty.

{¶ 4} After the trial Murley discovered in her possession ten documents that she believes demand a new trial. So, she filed a motion for a new trial based on newly discovered evidence. The trial court denied her motion, concluding that the documents would not change the outcome at a second trial. The court then sentenced Murley to three years of community control.

{¶ 5} Before us now is Murley's timely appeal. She assigns one error to her conviction and one error to the trial court's decision to overrule her motion for a new trial.

II

First assignment of error

{¶ 6} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN PERMITTING THE PLAINTIFF-APPELLEE TO INTRODUCE INTO THE RECORD THE DEFENDANT-APPELLANT'S PRIOR CONVICTION OF THEFT."

{¶ 7} In 2005, Murley got into trouble for making many expensive long-distance phone calls using the Springfield Fire Department's telephone, where she was working. She was charged with theft and pled guilty. The first assignment

of error focuses on the trial court's decision to admit evidence of her prior conviction. Murley's supporting contention, though, focuses on the prosecutor's attempted and inappropriate use of this evidence as character evidence showing a propensity for thievery.

{¶ 8} Looking first at the admission of the evidence, we find no error because it was Murley herself who, on direct examination, first introduced the evidence of her prior conviction. And later, when the prosecutor sought to introduce a certified copy of the judgment, she stipulated to the conviction. Any error that the court committed, then, Murley invited it to commit. "A party cannot take advantage of an error he invited or induced." *State v. Seiber* (1990), 56 Ohio St.3d 4, 17. Even absent Murley's introduction and invitation, the evidence of her prior conviction would likely have been admissible under Evidence Rule 609(A)(3) for the purpose of attacking her credibility.¹ Evidence of a crime that involves dishonesty is admissible for such a purpose, and theft is such a crime. *State v. Carlisle* (Nov. 16, 1994), Montgomery App. No. 13901 ("Under Ohio law, 'dishonesty' * * * has been interpreted to include theft."). Murley argues that it would be excluded by Evidence Rule 404(B) because the prosecutor sought to use it as character evidence.² However, as we will

¹"For the purpose of attacking the credibility of a witness: * * * notwithstanding Evid.R. 403(A), but subject to Evid.R. 403(B), evidence that any witness, including an accused, has been convicted of a crime is admissible if the crime involved dishonesty or false statement, regardless of the punishment and whether based upon state or federal statute or local ordinance." Evid.R. 609(A)(3).

²"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Evid.R. 404(B).

presently discuss, the trial court properly restricted the jury's use of the prior-conviction evidence to considerations of the weight and credibility they ought to give Murley's testimony.

{¶ 9} Murley's contention regarding the prosecutor's attempt to use the prior-conviction evidence to show character or action in conformity does not present reversible error. We mentioned already that after Murley testified about her prior conviction, the prosecutor, during his cross examination of her, sought to admit a certified judgment-entry of the conviction. To this, defense counsel objected, and a sidebar conference was held. The prosecutor explained, "my intent in entering that exhibit [the judgment entry] is not prior bad act. Right now I'm impeaching this witness's credibility and this goes to credibility. This is a prior conviction of a crime of dishonesty." (Tr. 367). Defense counsel in the end agreed to stipulate to Murley's prior conviction. The judge then told the jury about the stipulation, and the prosecutor continued his examination. The prosecutor began a line of questioning that culminated in the question that is the focus of Murley's argument. Said the prosecutor, "So to resume my questioning, it is true that you have been convicted of a crime of dishonesty?"

{¶ 10} "A. I don't really understand.

{¶ 11} "Q. What was your conviction for?

{¶ 12} "A. It was for theft.

{¶ 13} "Q. And I think you testified that the victim of that theft was the Springfield Fire Department?

{¶ 14} "A. Yes.

{¶ 15} “Q. Okay. So wouldn’t you agree that you have a pattern of stealing from public entities?” (Tr. 370-371).

{¶ 16} Defense counsel at once objected. Sustaining the objection, the court instructed the jury to disregard the question.

{¶ 17} Evidence Rule 105 allows evidence to be admitted for one purpose but not another and permits a trial court to restrict use with an instruction to the jury.³ Here, the trial court did just that. When Murley first began to testify on direct examination about her prior conviction, the trial court, interrupting, turned to the jury and said:

{¶ 18} “Ladies and gentlemen of the jury, the defendant has just introduced evidence of a prior conviction. That evidence is received only for limited purposes not received [sic], and you may not consider it to prove the character of the defendant in order to show that the defendant acted in accordance with that character.

{¶ 19} “If you find that the defendant has been convicted of this conduct, you may consider that evidence only for the purposes of testing the defendant’s credibility or believability and the weight to be given to defendant’s testimony. It cannot be considered for any other purpose.”

{¶ 20} (Tr. 342-343). Later, before placing the case in the jury’s hands, the court repeated this limiting instruction. Hearing the limiting instruction twice and the instruction to disregard the prosecutor’s inappropriate question, the jury was

³“When evidence which is admissible as to one party or for one purpose but not admissible as to another party of [sic] for another purpose is admitted, the court, upon request of a party, shall restrict the evidence to its proper scope and instruct the jury accordingly.” Evid.R. 105.

adequately immunized against misuse.

{¶ 21} This is not the first time we have declined to reverse in such a situation. In *State v. Owings*, Montgomery App. No. 21429, 2006-Ohio-4281, the trial court gave a limiting instruction very similar to the one given by the trial court here. Rejecting the defendant's argument that the prosecutor improperly used the prior-conviction evidence, we said that "[the] instruction ensured that the jury would use the prior convictions solely for testing the credibility of the witness, which is an acceptable use under Evid.R. 609." *Id.* at ¶77. "The jury," we said, "is presumed to follow instructions it is given." *Id.*

{¶ 22} The first assignment of error is overruled.

Second assignment of error

{¶ 23} "THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT THE DEFENDANT-APPELLANT A NEW TRIAL, PURSUANT TO CRIMINAL RULE 33(A)(6)."

{¶ 24} After the trial, Murley discovered that she possessed ten documents that, she believes, show that she is honest and trustworthy. Based on these documents, she filed a motion for new trial under Criminal Rule 33(A)(6),⁴ which the trial court overruled because it did not think that the documents would change the

⁴ "Crim.R. 33 New Trial"(A) Grounds "A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights: * * * (6) When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial. * * *"

outcome at a second trial. Murley begs to differ.

{¶ 25} The decision about whether to grant a new trial is placed within the discretion of the trial court, and we review the court's decision only for abuse of discretion. *State v. Matthews* (1998), 81 Ohio St.3d 375, 378; *State v. Schiebel* (1990), 55 Ohio St.3d 71, at paragraph one of the syllabus ("A motion for new trial pursuant to Crim.R. 33(B) is addressed to the sound discretion of the trial court, and will not be disturbed on appeal absent an abuse of discretion."). We find no abuse of the trial court's discretion.

{¶ 26} We have said that "[i]n order to prevail on a motion for a new trial based on newly discovered evidence pursuant to Crim.R. 33(A)(6), the defendant must meet three requirements: (1) he used reasonable diligence in trying to find the evidence; (2) he must present affidavits to inform the trial court of the substance of the evidence that would be used if a new trial were to be granted; and (3) the evidence presented must be of such weight that a different result would be reached at the second trial." *State v. Shepard* (1983), 13 Ohio App.3d 117, at paragraph one of the syllabus. It is the third element that we focus on here. Also, of the six factors established by *State v. Petro* (1947), 148 Ohio St. 505, that must be satisfied before a new trial may be granted, the first is pertinent here.⁵ The first factor, similar to the

⁵*Petro's* syllabus reads, "To warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence." *Petro* remains good law despite the subsequent enactment of Criminal Rule 33. *Dayton v. Martin* (1987), 43 Ohio App.3d

third element cited above, says that the new evidence must “disclose[] a strong probability that it will change the result if a new trial is granted.” *Id.* at the syllabus. “The mere possibility of a different outcome is insufficient.” 90 Ohio Jurisprudence 3d (2009), Trial, Section 665 (Citations omitted). We agree with the trial court that Murley cannot show a strong probability that the documents will result in her acquittal at a second trial.

{¶ 27} Murley’s defense at trial was in essence that she had no motive to lie to Champaign County. She told Clark County in November 2006 that she was employed at Cambridge Home Healthcare. And she believed that Clark County, in transferring her case, would send this information to Champaign County. She simply misunderstood the questions regarding her employment and income. The glitch in her defense, however, is that, while Murley did tell Clark County of this job in November, at that time she was not earning a paycheck because she was on maternity leave. Clark County based her assistance on the fact that, although technically employed, she was not earning an income. Murley was obligated to tell Clark County when she returned to work, but she failed to do so after she returned to gainful employment there in January 2007. In her testimony at trial, Murley admitted to this. Kim Smith, Murley’s caseworker in Clark County, also testified that Murley did not tell her that she had returned to work. Why Murley did not tell is controverted. Betsy Kite, a Champaign County supervisor, testified that Murley told her that she did not tell Clark County because, not being sure how much money she

87, 90 (“Although *Petro* was decided before Crim.R. 33, its holding has been followed since the adoption of the Criminal Rules.”) (Citations omitted).

was going to make, she thought she might still need assistance. But, testifying in her own defense, Murley said that she did not report her return to work because no one had told her she had to report when she went back. Murley, for unstated reasons, thought that once Clark County verified that she had a job, she did not need to update it on her employment status. The glitch then is that a reasonable juror could still find that Murley still had a reason to lie to Champaign County, even if the juror believed Murley's defense. She knew that Champaign County did not know she was back to work because she had not told Clark County. Consequently, whether Murley believed that Clark County sent Champaign County all her employment information, and whether it in fact did send all the information, is irrelevant.

{¶ 28} Two of the newly discovered documents, however, could remove the glitch from her defense because they suggest that Murley did in fact tell Clark County she had returned to work. One document is a Clark County employment verification form. It was signed by a manager at Cambridge Home Healthcare on February 18, 2007, and it was signed by Murley, according to the date beside her signature, on February 16, 2008. Murley claims that she mistakenly wrote "2008" and should have written "2007," the actual year, she claims, in which she signed it. The form states that she began working for Cambridge on August 8, 2006, and states that Murley is currently employed there earning \$9.00 per hour. The other document is a fax-transmission receipt that Murley claims proves that she faxed the verification form to Clark County. The receipt shows that a document was faxed on February 24, 2007. According to the receipt's header, the document was sent from an

“OfficeMax” store with a 702 area code, which would place the store in the Las Vegas, Nevada, area. The document was sent to a number that matches all but the last two numbers of the Clark County fax number printed on the verification form, suggesting that the document was sent to Clark County. The trial court concluded that the employment verification document—it did not address the fax receipt—does not raise a “substantial probability” of Murley’s acquittal at a second trial. We agree.

{¶ 29} These two documents raise several issues. First, they contradict Kim Smith’s testimony that Clark County did not know Murley was back to work. More important, however, the documents contradict Murley’s own admission that she did not tell Clark County she had returned to work. At trial, Murley never said that she faxed this employment verification form to Clark County, she never even hinted that she told Clark County sometime in early 2007 that she had returned to work. As we noted above, she testified that she did not tell Clark County because no one had told her she needed to. Second, when Murley signed the verification form remains a live issue. The trial court notes the dispute over the date on the form, saying that the state contends that Murley in fact signed the document in 2008, like she wrote, not 2007, like she now claims. The court did not resolve the issue but simply assumed, “arguendo,” that Murley was correct. Third, while the fax transmission receipt is supposed to be proof that Murley sent the form to Clark County, there is no way to link the two documents based on internal evidence. That is, it is simply not possible to conclude, looking only at the two documents, that the receipt was printed after the employment verification form was faxed. The receipt does not identify the document that was faxed.

{¶ 30} Murley also found eight other documents. The state points out that she conceded at the new-trial hearing that three of the documents were inadvertently included and were irrelevant.⁶ Those which remain, in addition to the two already discussed, are another employment-verification form that Murley sent to Clark County in January 2007 showing she lost her job at another company; a Clark County document-checklist showing the documents it received from Murley in November 2006; a blank time-sheet; an October 2006 letter from one of Murley's employers stating that she was employed there; and a Clark County notice of inter-county transfer showing that Murley's case was transferred on March 5, 2007, from Clark County to Champaign County. The trial court found that these documents were either irrelevant or failed to provide a strong probability of an altered outcome. At best the documents tend to show that Murley was honest with Clark County, said the trial court, but they prove nothing with respect to Champaign County.

{¶ 31} Upon reviewing the documents, we agree with the trial court. While the remaining documents suggest that Murley may not have hid her employment from Clark County in 2006, her offenses were against Champaign County in 2007. None of these documents suggest that she was honest and truthful with Champaign County concerning her employment at Cambridge Home Healthcare. Thus we need not review the remaining documents in any more detail.

{¶ 32} "[T]he task for the trial judge is to determine whether it is likely that the jury would have reached a different verdict if it had considered the newly discovered

⁶A pay stub from 2002 and two college-class schedules.

evidence.” *Dayton v. Martin* (1987), 43 Ohio App.3d 87, 90. And “[t]he task of the reviewing court is then to determine whether the trial judge abused his discretion in making his determination.” *Id.* (Citation omitted). We conclude that the trial court’s determination, that it is unlikely a second jury will reach a not-guilty verdict if it were to consider these documents, is not an abuse of the court’s discretion.

{¶ 33} The second assignment of error is overruled.

III

{¶ 34} Having overruled both assignments of error, the judgment of the trial court is Affirmed.

DONOVAN, P.J., and FROELICH, J., concur.

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