

[Cite as *State v. Moore*, 2010-Ohio-4322.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-10
Debra Moore,	:	(C.P.C. No. 08CR-09-6862)
Defendant-Appellant.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on September 14, 2010

Richard Cordray, Attorney General, Shawn P. Napier and Claude V. Nicholson, for appellee.

E. Darren McNeal, for appellant.

APPEAL from the Franklin County Court of Common Pleas

TYACK, P.J.

{¶1} Debra Moore is appealing from her felony convictions of complicity to commit theft by deception and complicity to commit identity fraud, journalized December 11, 2009. In the case against her, the State alleged that Moore, a quadriplegic receiving Medicaid, conspired with her daughter, Kesha Frazier, to establish independent Medicaid provider numbers for two family friends, which Moore and Frazier then used to bill the State of Ohio for in-home medical services purportedly rendered by those family friends. The total amount of the fraudulent Medicaid payouts to Moore and Frazier was

\$109,926.60. Neither Moore nor Frazier disputed the basic facts. However, their defense was that the billed services were actually provided, albeit by individuals other than the two to whom the State had issued the Medicaid payments. Two of the individuals alleged to have provided those services were daughters of one of the named providers, one of whom was a minor. The trial court and jury rejected that defense, and convicted Moore of all but one count in the indictment.

{¶2} Both Moore and Frazier have appealed their convictions,¹ alleging that there was insufficient evidence to sustain their convictions, and that their convictions were against the manifest weight of the evidence. The assignments of error notwithstanding, appellants essentially base their entire defense on a mistake-of-law theory, which is not a defense in the state of Ohio. For that reason, and for the reasons set forth fully in this decision, we affirm the judgment of the trial court.

FACTS

{¶3} As indicated above, the material facts are not in dispute, though they are a bit complex because of the number of individuals involved in the scheme, and their relationships to one another. Debra Moore is Kesha Frazier's mother. Debra Moore is a quadriplegic,² confined to a wheelchair, and her condition requires in-home care, seven days a week. Debra Moore's mother is Helen Moore, who is a paraplegic,³ also confined to a wheelchair. Helen Moore, who is Frazier's grandmother, also requires in-home care. Both Debra and Helen Moore are Medicaid recipients, and their in-home health services are provided, or at least administered, by the Ohio Department of Job and Family Services ("ODJFS") through independent, certified Medicaid health providers. Helen

¹ See *State v. Frazier*, 10th Dist. No. 10AP-112.

Moore was not charged in connection with this scheme, however, she is connected to this case insofar as she was one of the Medicaid recipients for whom Moore and Frazier allegedly billed fraudulent in-home health services.

{¶4} Beverly Squire is a friend/quasi-relative of the family (she married Debra Moore's cousin), and has known the family for more than 20 years. (Tr. 42–43.) Squire had lived near the family with her two daughters, but after getting evicted from her apartment in 2005, Squire moved to Las Vegas, Nevada, leaving her daughters behind. At the time Squire left Ohio, her daughters, Courtney and Nikki, were 15 and 19 years old, respectively. (Tr. 65.) Frazier and Moore were the younger daughter's de facto guardians while Squire was away. (Tr. 84.) Squire is one of the individuals whom Frazier enlisted as an independent Medicaid provider. To become an independent provider, the individual must complete a sort of certification process where the applicant files numerous forms with the State, and provides fingerprints, which facilitates a background check. After successfully completing the process, the State issues the applicant an independent provider number. Squire had previously been a home health provider through an agency, and although she had provided some care and assistance to Debra Moore, she stated that she did so voluntarily (i.e., not for pay). (Tr. 52, 86.)

{¶5} At trial, Squire was the State's primary witness against Moore and Frazier. She testified that prior to her leaving for Las Vegas, Debra Moore approached her about becoming an independent Medicaid provider for ODJFS. (Tr. 43.) Squire was apparently in financial straits, and was interested in the opportunity. She stated that Moore helped her fill out the paperwork to become an independent provider, and that Frazier took her to

² Paralyzed from the neck down, cannot walk, and has little or no use of the arms and hands.

get fingerprinted, and even paid the fingerprinting fee. (Tr. 43–44, 93–94, 105.) Squire apparently provided Moore with her social security number, but denied signing the application and tax documents introduced at trial, and she claimed that she had no knowledge that ODJFS had approved her application. (Tr. 46–47, 49.) Squire also testified that one of the reasons she moved to Las Vegas was because she had not heard back from ODJFS, and she needed to find employment immediately. (Tr. 69–70.) Squire claims that she first acquired knowledge that she had become an independent provider after receiving a letter from the IRS, while she was living in Las Vegas, which stated that she owed \$10,000 in federal income tax for unreported wages in Ohio. (Tr. 52.)

{¶6} The State introduced evidence of timesheets submitted in Beverly Squire's name, and 14 checks payable to her totaling \$35,184.60, about which Squire denied any knowledge. (Tr. 50–52, 55–58.) Squire further testified that she did not provide any of the care identified in the aforementioned timesheets, that she did not receive any of the corresponding funds, and that neither of her daughters provided the specified in-home health services to Debra Moore. (Tr. 89.)

{¶7} The other individual that Moore and Frazier enlisted as an ODJFS independent Medicaid provider was Jacquelyn Baker. Baker is also a friend/quasi-relative of the family—she is Debra Moore's niece by marriage.⁴ (Tr. 115.) Like Squire, Baker also had previous experience providing in-home health services. (Tr. 114–15.) Jacquelyn Baker's testimony was consistent with that of Beverly Squire, except that Baker stated that she did receive a confirmation and a Medicaid provider number from ODJFS. (Tr. 120.) Baker testified, however, that after receiving her Medicaid provider number,

³ Paralysis limited to below the waist.

Moore told her that her services were not needed. (Tr. 121.) About one-year later, Baker approached Frazier about providing in-home health services as an independent provider, and Frazier told Baker that she knew of a prospective patient, Territa Nappier. (Tr. 124–25.) Frazier told Baker that she and Baker could both work for this prospective patient using Baker's Medicaid provider number. (Tr. 124–25.) Baker testified that she resubmitted her fingerprints, on more than one occasion, but that she never received confirmation from ODJFS, so she assumed that they denied her re-application. (Tr. 125–26.) Finally, Baker testified that she did not provide any in-home health services to Debra or Helen Moore, nor to Territa Nappier, nor either of the other two individuals for whom she had purportedly submitted timesheets and Medicaid invoices. (Tr. 126–27.) Like Squire, Baker also received a letter from the IRS stating that she owed back taxes. (Tr. 129.) On cross-examination, the defense pursued a theory that Baker had used Frazier's and Moore's bank accounts to hide money from her ex-husband, while the two were amidst divorce proceedings. Baker flatly rejected that theory. (Tr. 149.)

{¶8} The State also presented the testimony of Territa Nappier, William Price, and Peggy Gawalek. Nappier testified that it was Frazier who, in fact, provided in-home health services to her. (Tr. 166–68.) She further stated that Squire never provided any services to her. (Tr. 174.) Price testified that he was responsible for arranging and managing in-home health services for his wife Sandra, a Medicaid recipient since suffering a stroke in 1998. (Tr. 163–64.) Price testified that the only time Baker came to their home was the evening before she was supposed to start, and that after that initial visit, she never returned. (Tr. 176, 178–79.) Peggy Gawalek, is a case manager for

⁴ Debra married Harold Moore, Jacquelyn Baker's uncle, however, although Debra and Harold are still

Maxine Bahmer, another Medicaid recipient who purportedly received in-home health services from Baker. (Tr. 193.) Gawalek testified that she had email communications regarding Bahmer's care with an individual claiming to be "Jackie Baker," but Gawalek stated that the corresponding email address was "Kesha_Frazier26@yahoo.com." (Tr. 195–97.) Upon reviewing her case notes, Gawalek further testified that the care that Bahmer (the patient) did receive was substandard, and that on more than one occasion, the provider had failed to show up. (Tr. 198–202.)

{¶9} Special Agent Sabrina Long is an investigator in the Ohio Attorney General's Office, Health Care Fraud Section. (Tr. 264–65.) Long was the special agent assigned to investigate the Squire-Baker matter after the IRS had referred it to ODJFS. (Tr. 267.) As part of her investigation, Long traced each payment that the State issued to Squire and Baker, and she determined that all but four of the checks were cashed or deposited using one of Kesha Frazier's bank accounts, or the account of her mother, Debra Moore. (Tr. 304.) Of the other four checks, one was endorsed to Campbell MacGuire Bail Bonds, on behalf of Kesha Frazier, and the remaining three checks were illegible, such that the financial institution that processed them could not be verified. (Tr. 304–05.) Long testified, however, that either Moore or Frazier endorsed each of the three remaining checks. (Tr. 305.) Long confirmed that 46 separate checks, totaling \$57,333.60 were processed through Frazier's bank account(s), and 46 others totaling \$49,761 were processed through Moore's account. (Tr. 306.) Finally, Long testified about Medicaid policies and procedures, specifically that individuals had to have a Medicaid provider number before they can provide in-home health services to Medicaid

married, they have been separated for 20 years.

recipients, and that individuals were prohibited from using another individual's provider number. (Tr. 309–10.)

{¶10} On September 17, 2008, a special grand jury indicted Kesha Frazier, as the principal actor in four felony counts (Counts 1 through 4 of the indictment),⁵ and indicted Debra Moore for complicity to commit theft by deception, a third-degree felony (Count 5 of the indictment), two counts complicity to commit identity fraud, third-degree felonies (Counts 6 and 7 of the indictment), and one count complicity to commit identity fraud, a second-degree felony (Count 8 of the indictment). (R. 2-4.) The State tried mother and daughter as co-defendants in a jury trial that began on October 6, 2009 and lasted several days. On October 14, 2009, the jury returned its verdict, finding Moore guilty of a lesser-included offense of Count 5 of the indictment, and also guilty on Counts 6 and 7 of the indictment. The jury found Moore not guilty on Count 8 of the indictment (complicity to commit identity fraud, Jacquelyn Baker and Beverly Squire, in an amount over \$100,000). The jury also returned guilty verdicts on all but one count against Frazier. On December 9, 2009, the trial court sentenced Moore to community control (probation), and ordered restitution of \$35,184.60 to ODJFS.⁶

{¶11} Debra Moore filed a timely notice of appeal on February 8, 2010, and now assigns two errors for our consideration:

ASSIGNMENT OF ERROR NO. 1: THE JUDGMENT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

ASSIGNMENT OF ERROR NO. 2: THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE DEFENDANT WHEN THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION.

⁵ See *State v. Frazier*, Franklin Cty. C.P. No. 08CR-6861.

⁶ The following month, the trial court sentenced Frazier to four years' of imprisonment, and ordered restitution of \$74,742 to ODJFS.

{¶12} Although in criminal cases the weight and sufficiency of the evidence supporting a trial court's verdict are two separate inquiries, *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, they are interrelated, and we will therefore consider them together.

{¶13} "Sufficiency of the evidence" is a term of art that refers to the legal standard that is applied to determine whether a case may go to the jury, or whether the evidence is legally sufficient to support the jury's verdict as a matter of law. *Id.* (citing Black's Law Dictionary (6th ed.1990)). Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Cassell*, 10th Dist. No. 08AP-1093, 2010-Ohio-1881, ¶37 (citing *Thompkins*, *supra*).

{¶14} To determine whether the evidence is sufficient to sustain the jury's verdict, an appellate court examines the evidence in the light most favorable to the prosecution, and then determines whether any rational trier of fact could have found that the prosecution proved the essential elements of the crime(s) beyond a reasonable doubt. *Cassell*, (citing *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶78). In evaluating the sufficiency of the evidence, we do not determine whether the evidence is believable, but rather, if believed, whether the evidence supports the conviction. See *Cassell*, (citing *Jenks*; *Thompkins* at 390 (Cook, J., concurring); *Yarbrough* at ¶79) (noting that appellate courts do not evaluate witness credibility when reviewing the sufficiency of the evidence). Finally, a court of appeals will not disturb a jury's verdict unless it determines that reasonable minds could not arrive at the conclusion reached by the jury. *State v. Treesh*, 90 Ohio St.3d 460, 484, 2001-Ohio-4; *Jenks* at 273.

{¶15} By contrast, when determining whether a verdict is against the manifest weight of the evidence, the court of appeals sits as a "thirteenth juror," reviewing the entire record, weighing all the evidence and reasonable inferences therefrom, and considering the credibility of the witnesses to resolve any conflicts therein. *Thompkins* at 387 (quoting *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211; *State v. Martin* (1983), 20 Ohio App.3d 172, 175). When resolving apparent conflicts or inconsistencies in the evidence, the reviewing court may not disturb the jury's verdict unless the record shows that the jury "clearly lost its way," creating "such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Thompkins* at 378 (quoting *Martin*, *supra*). Reversal on manifest weight grounds is reserved for only the most exceptional case where the evidence weighs heavily against the conviction. Additionally, the Ohio Constitution provides that the court of appeals may not reverse a jury's verdict on the manifest weight of the evidence unless all three appellate judges concur in the decision to reverse. See Section 3(B)(3), Article IV, Ohio Constitution ("No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause."); see also *Thompkins* at paragraph four of the syllabus.

{¶16} Turning to the evidence in this case, we will first examine the sufficiency of the evidence supporting Moore's convictions of complicity to commit theft by deception, and complicity to commit identity fraud. To do so, we must compare the facts found by the jury with the elements of each crime charged in the indictment.

{¶17} Consistent with the Model Penal Code ("M.P.C."), Ohio recognizes common-law accomplice liability as complicity. See R.C. 2923.03; cf. Black's Law

Dictionary (8th ed.2004) (citing M.P.C., Section 2.06) (defining complicity as the "[a]ssociation or participation in a criminal act; the act or state of being an accomplice."); see also *State v. Herring*, 94 Ohio St.3d 246, 251–52, 2002-Ohio-796 (using the terms "complicity" and "accomplice liability" interchangeably). In Ohio, a person is guilty of complicity to commit an offense if they act "with the kind of culpability required" to be guilty of the principal offense, while soliciting, assisting, or conspiring with another individual to commit the principal offense. See R.C. 2923.03. To be guilty of complicity, "the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal." *State v. Johnson*, 93 Ohio St.3d 240, 245, 2001-Ohio-1336. As with the principal offense, the trier of fact may infer the requisite intent from the circumstances surrounding the crime.

{¶18} The elements of the principal offense, theft by deception, are: (1) intent; (2) to deprive the owner; (3) of something of value—i.e., property or services; (4) without the owner's consent; and (5) by deception. See R.C. 2913.02. "Deprive" means to "[w]ithhold property of another permanently, or for a period that appropriates a substantial portion of its value or use[.]" R.C. 2913.01(C). "Deception" means "knowingly deceiving another or causing another to be deceived by any false or misleading representation, by withholding information, by preventing another from acquiring information, or by any other conduct, act or omission [that] perpetuates a false impression in another * * * as to law, value, state of mind, or other objective or subjective fact." R.C. 2913.01(A). The property's "owner" is "any person, other than the [accused], who is the owner of, who has possession or control of," the property in

question. R.C. 2913.01(D). Although intent is an essential element of the crime, the trier of fact may infer the accused's intent from the surrounding circumstances, and may presume intent where the natural and probable consequences of the accused's action(s) was calculated to produce the achieved result. See, e.g., *State v. Robinson* (1954), 161 Ohio St. 213, paragraph five of the syllabus; and *State v. Burke* (Dec. 28, 1993), 10th Dist. No. 90AP-1344, 1993 WL 541653 at *14 (holding that the jury's inference of intent was sufficient to sustain the defendant's conviction).

{¶19} Here, Moore does not dispute the material facts, which speak for themselves. As demonstrated by the endorsed Medicaid checks, and various testimony—especially that of Special Agent Sabrina Long—46 separate checks, totaling \$49,761, were processed through Moore's bank account. The money is, obviously, something of value, and it was under the control of the State of Ohio (until appellants misappropriated it). By keeping the money (or using it for whatever purpose(s) they used it for), appellants deprived the State of its use. Moore acted deceptively by reporting to ODJFS, or allowing them to believe that the named independent Medicaid providers were providing the in-home health services for which Moore and Frazier were submitting timesheets and invoices.

{¶20} Thus, there was sufficient evidence to prove theft by deception.

{¶21} Moore argues, however, that because of her physical disability, she could not have committed the crimes in question. We reject that argument, because even if appellant was physically unable to endorse, cash, or deposit the fraudulent Medicaid checks, she could still be guilty of theft, because the statute prohibits depriving another of valuable property. Moore testified in her own defense, and when she did, she claimed

that she had no knowledge of the scheme being perpetrated by her daughter. But the jury did not believe her defense. By the fact that Moore's and Frazier's bank accounts were each associated with 46 of the fraudulent Medicaid checks, and the fact that the total amounts are relatively similar, the evidence tends to show that the mother and daughter had carefully calculated their actions. Finally, the State charged and the jury convicted Moore of complicity to commit theft, not as the principal. The jury evaluated all of the evidence presented at trial, including the documentary evidence, and the testimony of the "victims," investigators, and one of the defendants, and after weighing the credibility of those witnesses and documentary evidence, the jury believed that Moore assisted her daughter in stealing more than \$100,000 from the State of Ohio. There is nothing before this court that suggests that we should disturb that verdict.

{¶22} We now turn to the charge of complicity to commit identity fraud. The definition and elements of complicity apply here in the same manner as above. Identity fraud and its elements are provided in R.C. 2913.49, the pertinent part of which provides that:

(B) No person * * * shall use, obtain, or possess any personal identifying information of another person with intent to do either of the following:

(1) Hold the person out to be the other person[.]

R.C. 2913.49.

{¶23} Furthermore, no person is permitted to use another's personal identifying information or hold his or herself out to be the other person with the intent to defraud another. See R.C. 2913.49(E).

{¶24} The testimony of Squire and Baker conclusively demonstrated that Moore's daughter used Squire's and Baker's social security numbers and other personal data to obtain Medicaid independent provider numbers from ODJFS. Even if Moore did not play an integral part in that portion of her daughter's scheme, there was evidence to show that Moore assisted her daughter in completing the crime(s) because she affirmed timesheets stating that Squire and Baker provided in-home health services to her when she knew that they did not. This evidence is more than sufficient to sustain Moore's convictions for complicity to commit identity fraud.

{¶25} Moore's and Frazier's supposition that they did not know that it was unlawful for an individual other than the authorized independent Medicaid provider to provide in-home health services (and collect payment for those services) is wholly irrelevant here. To hold otherwise, would lend credence to the mistake-of-law defense which is not recognized in Ohio. See, e.g., *State v. Pinkney* (1988), 36 Ohio St.3d 190, 198. Furthermore, knowledge that certain conduct is unlawful is not a necessary element for conviction. *Id.*

{¶26} Having found that there is sufficient evidence to sustain Moore's conviction, and that the verdict is not against the manifest weight of the evidence, we overrule both assignments of error. Having overruled all assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and CONNOR, JJ., concur.
