[Cite as *State v. Brown*, 2011-Ohio-4766.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 10AP-1204
v.	:	(C.P.C. No. 10CR-02-1093)
Marcus L. Brown,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 20, 2011

Michael DeWine, Attorney General, and *Michael T. Fisher*, for appellee.

Kingsley Law Office, *James R. Kingsley*, and *Nickolas D. Owen*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Defendant-appellant, Marcus L. Brown ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which convicted him for unlawfully acquiring payment from the Bureau of Workers' Compensation ("BWC"). For the following reasons, we affirm.

{¶2} Appellant was indicted on one count of workers' compensation fraud and one count of theft. The indictment alleged that appellant deceived BWC into paying him money, to which he was not entitled. Appellant pleaded not guilty, and a jury trial ensued.

{¶3} At trial, the prosecution established the following. Appellant, the owner of an elevator installation company, provides services to injured workers obtaining benefits from BWC. He signed a document agreeing to abide by all BWC billing policies and procedures and to bill only for services "actually" performed. (State's Exhibit I, 4.)

{¶4} William Hoffman is an injured worker receiving benefits from BWC. Hoffman's daughter, Melinda Myers, contacted appellant about installing a scooter lift on her father's truck. Appellant never installed the lift, but he billed for the project on three different occasions.

{¶5} In March 2007, appellant faxed a C-19 Service Invoice to the Ohio Employees Health Partnership ("OEHP"), which facilitates Hoffman's care and benefits on behalf of BWC. He requested payment of $5,295 and provided the date of service as March 12, 2007. BWC approved payment to appellant for $2,750, which was the monetary cap for a lift installation. The money was sent to appellant, and he deposited it into his bank account.

{¶6} In July 2007, appellant submitted another C-19 requesting payment for the Hoffman project. That second bill contained the same information as the first one, except for an increased charge of $6,295. BWC considered the second bill a duplicate

to the first one because both bills contained the same date of service. Therefore, BWC denied payment on the second bill.

{¶7} In August 2007, appellant submitted a third C-19 requesting payment for the Hoffman project. He repeated his request for $6,295, but he changed the date of service to August 12, 2007. On August 29, 2007, appellant spoke with Kim Gilmore, an OEHP employee, about the status of that third bill, and Gilmore told him that it was still being processed. Appellant indicated that he wanted payment on his entire charge, but Gilmore explained the cap that applied to the project. At that time, Gilmore did not know that appellant had received payment for the project previously.

{¶8} Appellant called Gilmore again on August 31, 2007. This time, appellant admitted that he had received payment for the Hoffman project even though he had not performed the work. Gilmore told appellant that he had to send back the payment he had received because he could not bill for a service that had not been performed. Appellant did not send the money back.

{¶9} Meanwhile, BWC approved payment of $2,750 on appellant's third C-19 because of the new date of service reflected on that bill. Appellant deposited the payment into his bank account on September 10, 2007.

{¶10} On October 24, 2007, appellant spoke with an OEHP employee about having BWC consider the Hoffman project a vehicle modification instead of a lift installation because he claimed Hoffman's truck needed to be modified before the lift was installed. Pursuant to BWC's policy, there is no fee cap for a vehicle modification. BWC will not provide payment until the modification has been completed, however.

{¶11} When BWC employee Sean Miller learned that appellant had not installed Hoffman's lift, he arranged for the work to be done by Mark Manson from Fitzpatrick Enterprises. Manson installed the lift on February 20, 2008, and he charged $2,000 for the "[v]ery simple" project. (Tr. Vol. II, 167.) The work entailed drilling four holes in the bed of Hoffman's truck and running an electric wire from the lift to the truck battery.

{¶12} After the prosecution rested its case-in-chief, appellant moved for an acquittal, pursuant to Crim.R. 29(A), and the trial court denied the motion. Next, appellant testified as follows on his own behalf. He submitted bills for the lift installation project with the assistance of Hoffman's caseworker, Camilla Ripley. With his first C-19, appellant identified the project as the installation of a manual lift, although he did not believe that Hoffman would be able to operate a manual lift. With his second C-19, appellant intended to alter the request to reflect the installation of an electrical lift, although he did not change the code or description of the lift. With his third C-19, appellant intended to update his prior C-19's to reflect the alteration of the vehicle at installation. Although he submitted three forms, he intended to make one submission "for the total price of the actual lift." (Tr. Vol. II, 311.) He had a lift in his stock supply, but installation was held up while he was communicating with OEHP about the C-19's and while his attention was diverted by another complicated project for BWC. He was never given a written demand to return any money he received for the Hoffman project, and he did not believe a fee cap applied to him because he planned on modifying Hoffman's truck in order to install the lift. He admitted, however, that he never examined Hoffman's truck.

{¶13} Next, the prosecution called Ripley as a rebuttal witness, and she testified that she did not recall helping appellant fill out C-19's. She also said that she did not tell appellant to use the C-19 as a means to obtain money beyond the fee schedule. In fact, she testified that her records provide no indication that she ever spoke with appellant about the Hoffman project.

{¶14} At the close of all the evidence, appellant renewed his Crim.R. 29(A) motion for an acquittal, and the trial court denied the motion. Before deliberation, the defense asked the trial court to instruct the jury that "in order to find the defendant guilty" of workers' compensation fraud and theft, "you must find that, at the time he took the money [from BWC], he had the present intent then and there not to perform the contract." The trial court refused that request over objection from the defense.

{¶15} During deliberation, the jury asked, " '[i]f someone knowingly falsified a document, is that enough to equal fraud?' " The defense asserted that the proper response to that question was, " '[n]o.' " (Tr. Vol. III, 472.) Over the defense's objection, the trial court told the jury to refer to the copy of the instructions it was given prior to deliberation. Thereafter, the jury found appellant guilty of workers' compensation fraud and theft, and it determined that he unlawfully acquired an amount more than $500 but less than $5,000.

{¶16} Appellant filed a motion for a new trial, pursuant to Crim.R. 33(A)(4), and claimed that the jury's verdict is not supported by the evidence. The trial court denied the motion. At sentencing, the trial court merged the workers' compensation fraud offense into the theft offense, and it sentenced appellant to community control.

{¶17} Appellant appeals, raising three assignments of error:

> [I.] Did the trial court commit prejudicial error when it refused to give any of Defendant's proposed jury instructions?
>
> [II.] Did the trial court commit prejudicial error in the response given to the jury deliberation question?
>
> [III.] Did the trial court commit prejudicial error when it denied Defendant's Ohio Crim. R. 29(A) motions to dismiss and Defendant's motion for a new trial?

{¶18} In his first assignment of error, appellant argues that the trial court erred by refusing his proposed jury instructions. We disagree.

{¶19} A court commits prejudicial error in a criminal case when it refuses to provide a requested jury instruction that is pertinent to the case, states the law correctly, and is not covered by the general charge. *State v. Sneed* (1992), 63 Ohio St.3d 3, 9. The court need not give redundant instructions, however. *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 148.

{¶20} Appellant wanted the court to instruct the jury that it could only find him guilty of theft and workers' compensation fraud if, "at the time he took [BWC's] money, he had the present intent then and there not to perform the contract." But the trial court conveyed that principle to the jury in the general instructions. For instance, the court instructed the jury that a person is not guilty of an offense unless he had the "requisite degree of culpability." The court also specified that appellant is guilty of workers' compensation fraud if he acted with a "purpose to defraud" or knew that a fraud was being facilitated. (Tr. Vol. III, 452.) And the court noted that appellant is guilty of theft if he had a "purpose to deprive" BWC of money. (Tr. Vol. III, 457.) Furthermore, the

court informed the jury that "[i]t must be established in this case that at the time in question there was present in the mind of the defendant a specific intention to deprive" BWC of funds and to "knowingly obtain these funds by deception." (Tr. Vol. III, 453-54, 457-58.) Consequently, we conclude that the trial court did not err by rejecting appellant's proposed instruction because it was redundant to the approved instructions.

{¶21} Next, appellant argues that the trial court erred by not instructing the jury that it could not draw an inference from another inference. But appellant did not raise this issue in the trial court; therefore, he forfeited all but plain error. See *State v. Wamsley*, 117 Ohio St.3d 388, 2008-Ohio-1195, ¶25. Plain error exists when there is error, the error is an obvious defect in the trial proceedings, and the error affects substantial rights, i.e., affects the outcome of the trial. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. A court recognizes plain error with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. Id. Here, the trial court admonished the jury against making an inference from another inference through its instruction that inferences are made from other facts established by direct evidence. See *State v. Palmer*, 80 Ohio St.3d 543, 561, 1997-Ohio-312. Therefore, the trial court did not commit plain error in the manner in which it instructed the jury on inferences. For all these reasons, we overrule appellant's first assignment of error.

{¶22} In his second assignment of error, appellant contends that the trial court improperly responded to the question the jury asked during deliberation. We disagree.

{¶23} A court's response to a jury's question during deliberation will not be disturbed absent an abuse of discretion. *State v. Carter*, 72 Ohio St.3d 545, 553, 1995-Ohio-104. An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶24} During deliberation, the jury asked, " '[i]f someone knowingly falsified a document, is that enough to equal fraud?' " The trial court referred the jury to the copy of the instructions it was given prior to deliberation. Appellant asserted at trial, however, that the proper response to the jury's question was, " '[n]o.' " (Tr. Vol. III, 472.) But that response was not suitable because the jury could have portrayed it as the trial court usurping its role by suggesting a verdict.

{¶25} Nevertheless, according to appellant, the trial court improperly referred the jury to the instructions already given because its question demonstrated that it needed clarification on what constitutes fraud. But the instructions correctly defined the charges against appellant and elaborated on specific terms contained in the definitions. Therefore, the trial court reasonably concluded that the jury would find an answer to its question by reviewing those instructions again. See *State v. Lindsey*, 87 Ohio St.3d 479, 488, 2000-Ohio-465 (concluding that when a question raised by the jury during deliberation is "clearly and comprehensively" answered by the instructions already given, it is not an abuse of discretion for the trial court to refer the jury back to the instructions rather than provide a new supplemental instruction). We overrule appellant's second assignment of error.

{¶26} In his third assignment of error, appellant argues that the trial court erred by denying his Crim.R. 29(A) motions for an acquittal and Crim.R. 33(A)(4) motion for a new trial. We disagree.

{¶27} A Crim.R. 29(A) motion for an acquittal tests the sufficiency of the evidence. *State v. Reddy*, 10th Dist. No. 09AP-868, 2010-Ohio-3892, ¶12. Accordingly, we review the trial court's denial of appellant's motions for an acquittal using the same standard applied for reviewing a sufficiency-of-the-evidence claim. Id. We also apply the sufficiency-of-the-evidence standard to review the trial court's decision to deny appellant's Crim.R. 33(A)(4) motion claiming that the jury's verdict is not supported by the evidence. See *State v. Gilfillan*, 10th Dist. No. 08AP-317, 2009-Ohio-1104, ¶30-31.

{¶28} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. We examine the evidence in the light most favorable to the state and conclude whether any rational trier of fact could have found that the state proved beyond a reasonable doubt the essential elements of the crime. *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. We will not disturb the verdict unless we determine that reasonable minds could not arrive at the conclusion reached by the trier of fact. *Jenks* at 273. In determining whether a conviction is based on sufficient evidence, we do not assess whether the evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. See

Jenks, paragraph two of the syllabus; *Yarbrough* at ¶79 (noting that courts do not evaluate witness credibility when reviewing a sufficiency of the evidence claim).

{¶29} With that standard in mind, we examine whether there is sufficient evidence to support the jury finding appellant guilty of workers' compensation fraud and theft. R.C. 2913.48 defines workers' compensation fraud and states that "[n]o person, with purpose to defraud or knowing that the person is facilitating a fraud, shall * * * falsify * * * any record or document that is * * * necessary to establish the nature and validity of all goods and services for which reimbursement or payment was received or is requested from" BWC. R.C. 2913.02 defines theft and states that "[n]o person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services * * * [b]y deception." We determine appellant's intent to commit those crimes from the surrounding facts and circumstances. *State v. Dillon*, 10th Dist. No. 05AP-679, 2006-Ohio-3312, ¶22.

{¶30} Appellant's charges pertain to money he acquired from BWC for a project requiring the installation of a lift on Hoffman's truck. As an initial matter, we note that, although appellant received $5,500 for the project, the jury found that appellant unlawfully acquired an amount between $500 and $5,000. Plaintiff-appellee, the state of Ohio, asserts that this finding by the jury reflects the amount appellant obtained from his August 2007 bill, for which BWC paid $2,750. Construing the evidence in a light most favorable to the state, we hold that the jury properly determined from the facts and circumstances that appellant intended to commit workers' compensation fraud and theft when he obtained the money from the August 2007 bill.

{¶31} Appellant submitted the August 2007 bill despite having already been paid for the Hoffman project. He did so by using a different date of service. Through this deception, appellant unlawfully obtained money over the fee cap BWC applied to the Hoffman project. And, appellant misled BWC into paying him for services not rendered.

{¶32} Appellant's intent to commit the crimes against BWC is also proven by his accepting payment on the August 2007 bill despite Gilmore's admonition that he was not entitled to it. In total, appellant's billings were substantially higher than the amount billed by the company that eventually performed the work. For all these reasons, we conclude that there is sufficient evidence to support the jury finding appellant guilty of workers' compensation fraud and theft.

{¶33} Next, appellant argues that the jury's verdict is against the manifest weight of the evidence. We disagree.

{¶34} In determining whether a verdict is against the manifest weight of the evidence, we sit as a " 'thirteenth juror.' " *Thompkins* at 387. Thus, we review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses. Id. Additionally, we determine "whether in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. We reverse a conviction on manifest weight grounds for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin* at 175. Moreover, " 'it is inappropriate for a reviewing court to interfere with factual findings of the trier of

fact * * * unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible.' " *State v. Brown*, 10th Dist. No. 02AP-11, 2002-Ohio-5345, ¶10, quoting *State v. Long* (Feb. 6, 1997), 10th Dist. No. 96APA04-511.

{¶35} Appellant contends that the jury's verdict cannot stand and offers his testimony that Ripley told him to file multiple C-19's to request payment for the lift installation. The jury reasonably rejected that testimony, however, because Ripley did not corroborate it when she testified.

{¶36} Appellant also asserts that the fact that he had a lift in stock shows that he intended to perform the Hoffman project when he accepted payment from BWC. Undermining this contention, however, is that appellant made no effort to start the installation, such as meeting with Hoffman to examine his truck.

{¶37} Lastly, appellant asserts that he committed no crime in taking money above BWC's fee cap for lift installations because the Hoffman project involved a vehicle modification, which had no fee cap. But Manson, the individual who actually installed the lift, established that appellant overstated the complexity of the project. In particular, Manson testified that the project was "[v]ery simple" and did not require a costly vehicle modification. (Tr. Vol. II, 167.) In any event, appellant cannot justify the fraudulent means he used to obtain money from BWC.

{¶38} In the final analysis, the trier of fact is in the best position to determine the credibility of the evidence. *State v. Mitchell*, 10th Dist. No. 10AP-756, 2011-Ohio-3818, ¶37. The jury accepted evidence implicating appellant for workers' compensation fraud

and theft, and appellant has not demonstrated a basis for disturbing the jury's conclusion. Accordingly, we hold that the jury's verdict finding appellant guilty of workers' compensation fraud and theft is not against the manifest weight of the evidence.

{¶39} Having concluded that the jury's verdict is based on sufficient evidence and is not against the manifest weight of the evidence, we hold that the trial court did not err by overruling appellant's Crim.R. 29(A) motions for an acquittal and Crim.R. 33(A)(4) motion for a new trial. Therefore, we overrule appellant's third assignment of error.

{¶40} In summary, we overrule appellant's three assignments of error. We affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and SADLER, JJ., concur.