[Cite as *State v. Claborn*, 2012-Ohio-1417.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 11AP-549
v.	:	(C.P.C. No. 10CR-02-1047)
Tonya Claborn,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 30, 2012

Ron O'Brien, Prosecuting Attorney, *Sarah W. Creedon*, and *Steven L. Taylor*, for appellee.

Todd W. Barstow, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶ 1} Defendant-appellant, Tonya Claborn ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which convicted her of unauthorized use of property, theft in office, and falsification. For the following reasons, we conclude that there was sufficient evidence to find that appellant committed these offenses, and her convictions were not against the manifest weight of the evidence. Nevertheless, we remand the case to the trial court for resentencing.

I. BACKGROUND

{¶ 2} The following facts were revealed at trial. On May 17, 2009, appellant was in a car accident involving two other cars. According to appellant, one of the cars stopped in a non-turning lane to make a left turn. When appellant stopped, she was hit from behind by another car. The turning car continued on, as appellant and the driver of the third car pulled over. The driver of the car who hit appellant from behind provided her with the name Marcus Jones and a phone number, but left quickly before the police could be contacted. Before he left, appellant took a picture of his license plate with her phone. The other car returned to the scene, and she also took a picture of that car's license plate.

{¶ 3} On the night of the accident, after unsuccessful attempts to contact Jones, appellant began to suspect that the accident was the result of a staged scam. Appellant then contacted her insurance company to assess her options for car repair. Appellant testified that, after providing the adjustor with the license plate numbers, she was told the first car was in fact registered to an Eshay Stanley, not Marcus Jones, and the license plate on the second car was invalid. According to appellant, this is the first time she learned of Stanley's true identity.

{¶ 4} At the time of the accident, appellant was employed by the Ohio Bureau of Workers' Compensation ("BWC") as a fraud investigator. As a fraud investigator, her job was to proactively seek out persons who were defrauding BWC. Investigators were permitted to investigate people for possible fraud, even if a field investigator or supervisor had not made a formal request, and there was no punishment if an investigation was not productive. Part of her job included working on special projects that involved using obituaries and prison publications to verify that people who died or were imprisoned were not receiving workers' compensation benefits. These projects were known to, and approved by, appellant's supervisor. To perform these duties, appellant had access to several computer information services that are not readily

accessible to the general public, namely Accurint[1] and ISOnet.[2] Appellant testified that she was very enthusiastic about her job.

{¶ 5} On May 18, 2009, the day after the accident, appellant reported to work as usual. During the course of her day, she spoke to several people, including a friend, Brenda Neary, who works in the Ohio Department of Public Safety ("DPS"), about her accident. According to appellant, she asked Neary if she knew how she could get more information on the owner of the vehicles using the license plate numbers she had in her possession, but Neary did not help appellant access any information.

{¶ 6} Later that day, appellant ran searches on her work computer using the license plate numbers of the cars involved in her accident. Testimony at trial showed that she used Accurint to run the searches, although testimony differed as to whether she also ran searches on ISOnet. Appellant thereafter filed the first of two police reports.

{¶ 7} A co-worker, Scott Fitzgerald, testified that, two days after the accident, appellant stated that she had a friend at DPS run the plates for her. Appellant denied saying this. Another co-worker, Berlis Preyor, testified that appellant called her over to her desk and told her that she had all of the first driver's information. Appellant told Preyor that she had obtained license plate information from DPS and military service information from a friend working in the military. Appellant showed Preyor a stack of papers, which Preyor assumed contained the information that appellant had gathered. Appellant also told Preyor that she called Stanley's mother in an effort to contact him. On May 19, 2009, appellant sent an email to Neary that stated: "I found the info I was looking for yesterday!" to which Neary replied: "Wonderful! Sorry I couldn't be of more help to you." Later, appellant filed the second police report, using Stanley's personal information.

{¶ 8} On May 20, 2009, Daniel Fodor, appellant's supervisor, was alerted to a potential issue with appellant using state resources to do research related to her

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[1] Accurint is a database of personal information, including Social Security numbers, addresses, phone numbers, and vehicle information. Before accessing this service at BWC, the user must go through several screens verifying that they are using the information for law enforcement purposes only.

[2] ISOnet is a database of insurance information accessible only to certain fraud analysts and agents.

accident. Fodor spoke to Preyor, who told him that appellant told her that someone from DPS helped her find the other driver's real identity.

{¶ 9} That same day, appellant also had a recorded conversation with her insurance company about her claim. In this conversation, appellant was the first to use the name "Eshay Stanley," and she told the investigator that she had not spoken to Stanley since the crash. When she was asked how she obtained Stanley's information, she told the investigator, "I can't tell you where I got the address from. It came from where his plates are registered." (Tr. Vol. III, 396.) At some point during the day, appellant received a voicemail from someone claiming to be Stanley. When appellant called the number that was left in the message, it went to an unidentified voicemail. Appellant did not hear from Stanley again.

{¶ 10} Fodor approached appellant on May 21, 2009, to discuss her accident. During this conversation, appellant stated that she did not speak to anyone at DPS about the accident while at work, and that she did her research on her own at home. When Fodor asked appellant for the names of the people involved in her accident, she told him she did not know their names. Appellant testified that she told Fodor she did not know the names of the people involved because she was given false information on the day of the accident.

{¶ 11} Fodor testified that he specifically asked appellant whether she ran any information through the systems at work or ran anything using state equipment, and she responded that she did not. The conversation ended with Fodor telling appellant that he was going to verify what she told him. According to appellant, Fodor asked if she had run any *reports*, and she said she had not. Appellant testified that she sent an email to Fodor after the conversation seeking to talk to him and tell him she ran *searches*, as opposed to reports, but Fodor did not respond.

{¶ 12} After concluding his conversation with appellant, Fodor reviewed her usage of Accurint for that week and found the two license plate searches appellant ran on May 18. Fodor testified that he found this unusual because he had never seen a BWC investigation request that required license plates to be run. Upon confirming that the license plates were not run as part of a field investigation request, Fodor contacted his

supervisor with the information he had gathered and his concerns. He thereafter obtained the police report associated with appellant's accident and confirmed that the plates that were run were the same plates involved in the accident. His supervisor directed him to give the information to Deneen Day, a special agent in the BWC Special Investigations Department.

{¶ 13} Day reviewed the database logs to determine which services appellant had accessed and noted that appellant ran two searches that were not involved in any cases in the BWC systems at that time. Day testified that, as a result of these searches, BWC was required to notify Stanley that his sensitive data had been accessed improperly.

{¶ 14} Joe Montgomery, a Deputy Inspector General for BWC, called appellant to his office on June 5, 2009. Appellant engaged in a recorded interview, under oath, with Montgomery and Ron Nichols. During this interview, appellant stated that her insurance adjustor discovered Stanley's true identity, and she obtained the information from the adjustor on May 18, the same day she conducted her search. When asked whether she ran any plates at work using state resources, appellant replied: "I verified the plate number of the gentleman that hit me. I didn't run any reports. I just did a search in Accurint to see if any plate numbers would come up. * * * I didn't run any reports or buy any - - anything after - - you know, other than that." (Tr. Vol. III, 417.) Montgomery continued with this line of questioning:

> INSPECTOR MONTGOMERY: Okay. So you ran the plate number of the gentleman that hit you from behind?
>
> DEFENDANT CLABORN: Um-hmm.
>
> INSPECTOR MONTGOMERY: Okay. And you ran that through Accurint?
>
> DEFENDANT CLABORN: Um-hmm.
>
> INSPECTOR MONTGOMERY: And you did that at work with your work computer.
>
> DEFENDANT CLABORN: Um-hmm.
>
> INSPECTOR MONTGOMERY: Do you admit that that was not related to state business?

DEFENDANT CLABORN: Yes.

(Tr. Vol. III, 417-18.) Appellant also told Montgomery that she knew Accurint and ISOnet were for business purposes only. Although Montgomery showed her a log indicating ISOnet searches regarding the other vehicles, and appellant took responsibility for whatever was on the log, appellant could not recall specifically whether she used ISOnet to run any searches relating to the accident. Appellant told Montgomery that she told Fodor she did all or most of her research at home. She also told Montgomery that she had denied using Accurint and ISOnet to Fodor.

{¶ 15} On February 17, 2010, appellant was indicted on charges for the following: unauthorized use of property (R.C. 2913.04); theft in office (R.C. 2921.41); perjury[3] (R.C. 2921.11); and falsification (R.C. 2921.12). Trial began on March 14, 2011, and a jury thereafter found appellant guilty of the remaining three charges. The trial court sentenced appellant to two years of community control under basic supervision under the condition that she remain in full-time employment.

II. ASSIGNMENTS OF ERROR

{¶ 16} Appellant timely filed a notice for appeal and now states the following assignments of error:

> I. THE TRIAL COURT ERRED AND DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION TEN OF THE OHIO CONSTITUTION BY FINDING HER GUILTY OF THEFT IN OFFICE; UNAUTHORIZED USE OF PROPERTY AND FALSIFICATION AS THOSE VERDICTS WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE AND WERE ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.
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> II. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY IMPOSING SENTENCES FOR THEFT IN OFFICE AS CHARGED IN COUNT ONE AND UNAUTHORIZED USE OF PROPERTY AS CHARGED IN COUNT TWO AS THOSE OFFENSES ARE ALLIED OFFENSES OF SIMILAR IMPORT COMMITTED WITH A

[3] This charge was dismissed on a motion during the trial.

SINGLE ANIMUS. THE TRIAL COURT FURTHER ERRED TO THE PREJUDICE OF APPELLANT BY NOT DIRECTING THE STATE TO ELECT ON WHICH OFFENSE CONVICTION WOULD BE ENTERED AND SENTENCE PRONOUNCED.

III. DISCUSSION

A. First Assignment of Error: Sufficiency and Manifest Weight of the Evidence.

{¶ 17} In her first assignment of error, appellant contends that the verdicts were not supported by sufficient evidence and were against the manifest weight of the evidence. We disagree.

{¶ 18} 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). 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,* 61 Ohio St.3d 259 (1991), 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* at paragraph two of the syllabus; *Yarbrough* at ¶ 79 (noting that courts do not evaluate witness credibility when reviewing a sufficiency of the evidence claim).

{¶ 19} 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*, 20 Ohio App.3d 172, 175 (1st Dist.1983). 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*, 10th Dist. No. 96APA04-511 (Feb. 6, 1997).

1. The Unauthorized Use of Property

{¶ 20} The jury found appellant guilty of unauthorized use of property. Under R.C. 2913.04(B), no person shall knowingly gain access to any computer, computer system or information service without the express or implied consent of the owner of the computer, computer system or information service, or other person authorized to give consent. Here, appellant used her work computer to access (at least) Accurint and ran the license plate numbers of the cars involved in her accident. Appellant was aware at the time of the searches that Accurint was to be used for business purposes only and that her searches were not related to her job. Appellant admitted to Montgomery, under oath, that she used her work computer to conduct these non-work related searches.

{¶ 21} At trial, appellant argued that she ran the searches as part of her job to proactively seek out workers' compensation fraud. Appellant claimed that, because the information she was given at the accident proved to be false, she was convinced that her accident was a part of a scam. Given her stated enthusiasm for her job, appellant testified that she thought it was possible that the individuals involved in her accident could be engaged in other types of fraud, including workers' compensation fraud. Appellant asserts that these searches were within the scope of consent of BWC as a part of her job, and she would not have been punished if she had found workers' compensation fraud.

{¶ 22} The weakness in appellant's argument is that her searches benefited her, not BWC. Appellant did not notify her supervisor that she was running the searches, either before or after she performed them, and when Fodor specifically questioned her about using state resources to find out information on the persons she believed to be involved in her accident, she denied doing so. Appellant's argument is further weakened

by the conflicting stories she told to various witnesses about when and how she obtained information about the accident. Based on the evidence, the jury could have reasonably concluded that appellant obtained the information on her own, she knew she had no permission to run the searches for her own benefit, and her actions were unauthorized.

{¶ 23} Appellant also relied on BWC's internal memo 4.14, which states that some non-work related usage of the computer and internet may be occasionally necessary. This reliance is not persuasive because appellant was not simply sending non-work related emails or checking a news website on the internet; she was running searches on a database that was authorized for law enforcement purposes, as related to BWC, only.

{¶ 24} Memo 4.14 also states that unacceptable personal use is "[a]ny use of IT resources that disrupts or interferes with the BWC business, incurs an undue cost to the BWC, could potentially embarrass or harm the BWC, or has the appearance of impropriety." While appellant's searches took only about two minutes and cost BWC less than two dollars, they did have the potential to harm or embarrass BWC. As a consequence of appellant's actions, BWC had to notify Stanley that his information had been accessed improperly. While BWC did permit some personal use of the internet, appellant's searches fell outside of the BWC's scope of consent and appeared improper.

{¶ 25} For all these reasons, we conclude that there was sufficient evidence that appellant used her work computer and, at least, the Accurint database for her own personal benefit and not for a legitimate law enforcement purpose. Further, her conviction for the unauthorized use of property was not against the manifest weight of the evidence.

2. Theft in Office

{¶ 26} The jury also convicted appellant of theft in office. The offense of unauthorized use of property is a "theft offense." R.C. 2913.01(K)(1). R.C. 2921.41(A)(2) defines the crime of theft in office and states that no public official or party official shall commit any theft offense when the property or service involved is owned by the state of Ohio. A public official is defined as "any elected or appointed officer, or employee, or agent of the state or any political subdivision, whether in a temporary or permanent capacity, and includes, but is not limited to, legislators, judges, and law enforcement

officers." R.C. 2921.01(A). At the time of the offense, appellant was an employee of BWC, and as such was a public official under R.C. 2921.41. Appellant, as an employee of the state, committed a theft offense—unauthorized use of property—using the state's computer and the state's access to Accurint. Therefore, the evidence is sufficient to find that appellant was guilty of theft in office, and her conviction is not against the manifest weight of the evidence.

3. Falsification

{¶ 27} Finally, the jury convicted appellant of falsification. Under R.C. 2921.13(A)(3), no person shall knowingly make or affirm a false statement with the purpose to mislead a public official performing an official function. In this case, Fodor testified that appellant denied using any state equipment in relation to her accident and stated that she had done all of her research at home. There was no ambiguity when Fodor asked appellant whether she had used BWC resources to do her research; she answered negatively and, therefore, falsely, with the obvious purpose to mislead him. Even after Fodor told appellant he was going to verify what she told him, appellant did not admit to the searches. This evidence was sufficient to support a finding that appellant is guilty of falsification, and her conviction was not against the manifest weight of the evidence.

{¶ 28} For the foregoing reasons, appellant's first assignment of error is overruled.

B. Second Assignment of Error: Merging Allied Offenses

{¶ 29} In her second assignment of error, appellant contends that the court erred by convicting and sentencing her on the allied offenses of unauthorized property and theft in office. The state concedes that error occurred, and we agree.

{¶ 30} R.C. 2941.25(A) states that, when the same conduct by a defendant can be construed to constitute two or more allied offenses of similar import, then the defendant can be convicted of only one of those offenses. The Supreme Court of Ohio has articulated a two-part test to determine whether two offenses are allied under this statute. *See State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, ¶ 16. First, we compare the elements of the two crimes. If the elements of the offenses correspond to

such a degree that the commission of one crime will result in the commission of the other, then the crimes are allied offenses of similar import, and we proceed to the second step. *Id*. Second, we review the defendant's conduct to determine whether the defendant can be convicted of both offenses. If we find that the crimes were committed separately or that there was a separate animus for each crime, then the defendant may be convicted of both offenses. *Id*.

{¶ 31} Here, the elements of the crime of unauthorized use of property and the elements of the crime of theft in office correspond to such a degree that they are allied offenses of similar import. Further, appellant's searches on her BWC computer caused her convictions for both crimes. There was no separate animus, as appellant committed both offenses through this single act. Where there are two allied offenses of similar import, the state may try both, but if the defendant is convicted of both offenses, the state must decide which offense will merge into the other, and defendant must be sentenced for the single offense. *State v. Brown*, 119 Ohio St.3d 447, 455-56, 2008-Ohio-4569. Because the trial court did not merge the convictions and sentence appellant only on one, the trial court erred.

{¶ 32} For the foregoing reasons, appellant's second assignment of error is sustained. We remand the case to the trial court for the proper merger and resentencing of the convictions for unauthorized use of property and theft in office.

IV. CONCLUSION

{¶ 33} In summary, we overrule appellant's first assignment of error and sustain appellant's second assignment of error. We affirm in part and reverse in part the judgment of the Franklin County Court of Common Pleas and remand the case for resentencing in a manner consistent with this decision.

Judgment affirmed in part, reversed in part; cause remanded.

KLATT and TYACK, JJ., concur.