[Cite as *State v. Kimkhe*, 2012-Ohio-1964.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 11AP-433
v.	:	(C.P.C. No. 09CR-09- 5579)
Roman B. Kimkhe,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on May 3, 2012

Mike DeWine, Attorney General, and *Shawn P. Napier*, for appellee.

Samuel H. Shamansky Co., LPA, Samuel H. Shamansky and *Donald L. Regensburger*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶ 1} Defendant-appellant, Roman B. Kimkhe ("appellant"), appeals from an April 20, 2011 judgment of conviction and sentence entered by the Franklin County Court of Common Pleas, following a jury trial in which the jury returned a verdict finding appellant guilty of theft by deception in violation of R.C. 2913.02(A)(3), a felony of the fourth degree. For the following reasons, we affirm.

{¶ 2} On September 15, 2009, a Franklin County Grand Jury indicted appellant on one count of theft by deception in violation of R.C. 2913.02(A)(3). The indictment alleged that, from on or about July 18, 2005 to January 28, 2009, appellant obtained monies for services not reimbursable by the Ohio Department of Job and Family Services, Ohio Medical Assistance Program ("Medicaid"). (*See* Indictment, 1.) The indictment further alleged that the value of said property or services was $100,000 or more, but less than $500,000, a felony of the third degree. (*See* Indictment, 1.) The charge in the

indictment stems from appellant's Medicaid billing practices with regard to his medical transportation company, 1st Advanced Transportation.

{¶ 3} On September 29, 2009, appellant entered a plea of not guilty as to the charge in the indictment.

{¶ 4} On August 30, 2010, a six-day jury trial commenced. At trial, several of 1st Advanced Transportation's clients testified on behalf of the state, including Asya Kaplan, Ettya Bulkovshteyn, Sof'ya Krasinskoya, Irina Arie, Vasiliy Mamontov, Deborah Reeves, Tracy Richardson, and Carlos Regalado. In addition, Vicky Fisher, home health aide to Deborah Reeves, and Emile Robinson, home-care nurse to Awanna Mock, testified on behalf of the state. The state also called Robert R. Althoff, one of appellant's former EMTs, Anitra Blake, appellant's former EMT director, Ronald Grout, Executive Director of the State of Ohio Medical Transportation Board, and Special Agent Andrew Kalas ("Agent Kalas"), Office of Attorney General, Health Care Fraud Section. Further, appellant testified upon his own behalf.

{¶ 5} In the present matter, the state alleged that appellant engaged in the crime of theft by deception by transporting clients in ambulettes, without wheelchairs, and billing Medicaid. Ohio Adm.Code 5101:3-15-03(B)(2) states, in relevant part, that "[e]xcept as provided elsewhere in this chapter, ambulette services are covered only when all the requirements in this paragraph are met[:] * * * (b) [t]he vehicle used for the transport must be an ambulette as defined in paragraph (A)(4) of rule 5101:3-15-01 of the Administrative Code[1] * * * [and] (e) [t]he individual must actually be transported in a wheelchair."

{¶ 6} Bulkovshteyn, Krasinskoya, Arie, Mamontov, Reeves, Richardson, and Regaldo testified that they are Medicaid recipients and that appellant's company, 1st Advanced Transportation, transported them without wheelchairs. We note that Kaplan's testimony is unclear because the interpreter appears to paraphrase, use the third person, and, at times, contradict the witness's English language testimony. Specifically, in response to whether she was transported in a wheelchair, Kaplan testified, "[n]o, I not remember," and the interpreter stated, "[s]he said no." (Tr. 43.)

[1] Ohio Adm.Code 5101:3-15-01(A)(4) defines ambulette as "a vehicle that is designed to transport individuals sitting in wheelchairs and meets standards specified in rule 5101:3-15-02 of the Administrative Code."

{¶ 7} Further, Vicky Fisher, Deborah Reeves' home health aide, testified that appellant never transported Reeves in a wheelchair, and Emile Robinson, Awanna Mock's home-care nurse, testified that, on one occasion when she observed Mock being transported by appellant's company, she was transported without a wheelchair.

{¶ 8} On September 7, 2010, the jury returned a verdict of guilty of theft as charged in Count 1 of the indictment. Further, the jury, having found appellant guilty of theft, also found that the property involved was more than $5,000, but less than $100,000. (*See* Verdict.) On April 11, 2011, the trial court sentenced appellant to a five-year period of community control and restitution to the Ohio Department of Job and Family Services in the amount of $61,431.56. Further, the trial court informed appellant that, if he violates community control, there is the possibility of 18 months in the penitentiary. The trial court journalized its judgment entry on April 20, 2011.

{¶ 9} On May 11, 2011, appellant filed a timely notice of appeal setting forth three assignments of error for our consideration:

> ASSIGNMENT OF ERROR NO. 1
>
> THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY REGARDING THE OFFENSE OF THEFT, THEREBY RELIEVING THE STATE OF ITS BURDEN OF PROOF AND VIOLATING APPELLANT'S RIGHT TO DUE PROCESS AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.
>
> ASSIGNMENT OF ERROR NO. 2
>
> THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO PROPERLY ANSWER THE JURY'S QUESTION REGARDING APPELLANT'S *MENS REA*, RESULTING IN THE JURY BECOMING CONFUSED AS TO THAT ELEMENT, THEREBY DEPRIVING HIM OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.
>
> ASSIGNMENT OF ERROR NO. 3
>
> THE JURY'S VERDICT OF GUILTY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, THEREBY DEPRIVING APPELLANT OF DUE PROCESS OF LAW AS

GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

{¶ 10} In his first assignment of error, appellant argues that the trial court improperly instructed the jury regarding the offense of theft because it provided an instruction on the reimbursement requirements for ambulette services found in the Ohio Administrative Code without further instructing the jury, pursuant to Evid.R 201(G), that it may, but is not required to, accept as conclusive any fact judicially noticed. (*See* appellee's brief, 10-11), *see also* Evid.R. 201(G). Further, appellant argues that the trial court's instruction, with the inclusion of Ohio Adm.Code 5101:3-15-03, "relieved the State of proving beyond a reasonable doubt that Appellant was deceptive in his billing and that he had the requisite state of mind to commit the criminal offense of theft," and it also "invited the jury to improperly substitute civil liability for criminal culpability." (*See* appellant's brief, 12.)

{¶ 11} In response, the state argues that Crim.R. 27 adopts the judicial notice provisions of Civ.R. 44.1, thus requiring the trial court to take full judicial notice of the statutory laws of Ohio and present that law to the jury without any separate proof. (*See* appellee's brief, 13-14.) In support of its argument, the state cites the Fifth District Court of Appeal's decision, *State v. Morales*, 5th Dist. No. 2004 CA 68, 2005-Ohio-4714, and the Supreme Court of Ohio's decision, *State ex. rel. Celebrezze v. Natl. Lime & Stone Co.*, 68 Ohio St.3d 377 (1994). Further, the state argues that the inclusion of the Ohio Administrative Code sections did not relieve it from having to prove, and the jury from having to find, "that [a]ppellant violated that law with the purpose to deprive ODJFS of money, and knowingly caused 1st Advanced to obtain the money by deception." (*See* appellee's brief, 14.)

{¶ 12} "When reviewing a trial court's jury instruction, the proper standard of review for an appellate court is whether the trial court's decision, to give a requested jury instruction, constitutes an abuse of discretion under the facts and circumstances of the case." *Power v. Kirkpatrick*, 10th Dist. No. 99AP-1026, 2000 WL 992028, *2, citing *State v. Wolons*, 44 Ohio St.3d 64, 68 (1989.) "It is well established that a trial court has broad discretion in instructing the jury." *State v. Smith*, 10th Dist. No. 01AP-848, 2002 WL 484927, *2. "The proper standard of review for an appellate court is whether the trial

court's refusal to give a requested jury instruction constituted an abuse of discretion under the facts and circumstances of the case." *Id*. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Id*., citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 13} Here, the trial court's instruction to the jury is based upon Ohio Adm.Code 5101:3-15-03(B)(2)(b) and (e). As stated above, Ohio Adm.Code 5101:3-15-03(B)(2), mandates that "[e]xcept as provided elsewhere in this chapter, ambulette services are covered only when all the requirements in this paragraph are met[:] * * * (b) [t]he vehicle used for the transport must be an ambulette as defined in paragraph (A)(4) of rule 5101:3-15-01 of the Administrative Code, * * * [and] (e) [t]he individual must actually be transported in a wheelchair." Further, Civ.R. 44.1(A)(1) states that "[j]udicial notice shall be taken of the rules of the supreme court of this state and of the decisional, constitutional, and public statutory law of this state." Finally, Crim.R. 27 states "[t]he * * * judicial notice * * * provisions of Civil Rule 44.1 apply in criminal cases."

{¶ 14} At trial, appellant's counsel objected to the trial court taking judicial notice of Ohio Adm.Code 5101:3-15-03(B)(2)(b) and (e), and the following discussion ensued:

> Mr. Shamansky: On behalf of [appellant], Your Honor, the instructions are fine. We would object, of course, to, in order for an ambulette transport to be covered by Medicaid, it must actually be transported in a wheelchair. That's our only objection. They only take two of about eight requirements and put them in there.
>
> The Court: Well, that's the essence of their fraud. Do you want all eight requirements put in there?
>
> Mr. Shamansky: No. I don't want any of it in there, but you understand.
>
> The Court: Well, unfortunately, they filed a motion, which has never been technically filed, I'm to take judicial notice of the Administrative Code, correct?
>
> Mr. Napier: That's correct, Your Honor.
>
> The Court: Which is state law, and I'm kind of stuck taking notice of it.

> Mr. Shamansky: It's an adjudicated fact. Just for the record, I object.

(Tr. 306-07.)

{¶ 15} However, over appellant's counsel's objection, the trial court issued the following jury instruction regarding the elements necessary to prove theft by deception:

> In Count 1 of the indictment, [appellant] is charged with having committed Theft against the Ohio Department of Jobs and Family Services, commonly referred to as ODJFS. Before you can find the [appellant] guilty, you must find beyond a reasonable doubt that in Franklin County, Ohio, from on or about July 18, 2005, to on or about July 28, 2009, the [appellant], with purpose to deprive the owner of funds, knowingly caused an organization, 1st Advanced Transportation, to obtain these funds by deception.

(Tr. 434.) Further, after instructing the jury on the definitions of knowingly, purposely, deprivation of property, owner, and deception, the trial court stated:

> In order for an ambulette transport to be covered by Medicaid, the person being transported must actually be transported in a wheelchair. In addition, the vehicle used for the transportation must be a vehicle designed to transport individuals sitting in wheelchairs.

(Tr. 436.)

{¶ 16} During its deliberation, the jury sent the trial court the following question:

> Please provide any sections of the Ohio Revised Code and/or the Ohio Administrative Code that details the requirement listed in the 1st sentence of the last paragraph on Page 6 of the jury instructions (or any other document).

(Tr. 451.) In response, the trial court answered, "[s]ee attached," and provided a copy of the Ohio Administrative Code. (Tr. 451.) Subsequently, the jury sent the trial court a second question regarding whether it is relevant as to "whether [appellant] knew what he was doing was wrong." (Tr. 452.) The jury did not pose any further questions to the trial court regarding the Ohio Administrative Code.

{¶ 17} Based upon the record before us, we cannot say that the trial court acted unreasonably, arbitrarily, or unconscionably in instructing the jury on the elements of theft and in taking judicial notice of the relevant sections of the Ohio Administrative Code.

Additionally, there is no evidence that the trial court's instruction caused the jury to confuse civil liability for criminal culpability. First, the trial court clearly explained to the jury that, in order to find appellant guilty of theft, they must find beyond a reasonable doubt that appellant, with purpose to deprive the owner of funds, knowingly caused an organization, 1st Advanced Transportation, to obtain these funds by deception. (Tr. 434.) The trial court further explained that:

> Reasonable doubt is present when, after you have carefully considered and compared all the evidence, you cannot say that you are firmly convinced of the truth of the charge. Reasonable doubt is doubt based on reason and common sense. Reasonable doubt is not mere possible doubt because everything relating to human affairs and depending on on [sic] moral evidence is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his or her own affairs.

(Tr. 431.) The jury is presumed to follow instructions given by the court, and there is no evidence in the present matter that the jury failed to follow the trial court's instructions. *See Pang v. Minch*, 53 Ohio St.3d 186 (1990), paragraph four of the syllabus. Second, based upon the jury's second question to the trial court regarding appellant's requisite mens rea, the jury focused on the "knowledge" requirement set forth in R.C. 2913.02(A). As such, it appears the jury deliberated regarding the mens rea required for theft by deception and did not base its finding of guilt upon the Ohio Administrative Code. Third, there is no evidence in the record that the jury failed to base appellant's conviction solely upon the required elements set forth in R.C. 2913.02(A)(3): that appellant, with purpose to deprive ODJFS of property or services, knowingly obtained or exerted control over either the property or services by deception. Therefore, we find that the trial court did not abuse its discretion.

{¶ 18} Appellant's first assignment of error is overruled.

{¶ 19} In his second assignment of error, appellant argues that the trial court abused its discretion by failing to properly answer the jury's second question regarding appellant's mens rea, thereby resulting in the jury becoming confused as to that element. (*See* appellant's brief, 13.)

{¶ 20} In response, the state argues that the trial court did not abuse its discretion by simply referring the jury to the written jury instructions that they had within their possession in the jury room and reiterating those instructions. (*See* appellee's brief, 16.) Further, the state argues that "[t]he jury deliberated for approximately twelve hours before rendering its verdict." (*See* appellee's brief, 16.) The state also contends that appellant's argument is pure speculation because "the jury never indicated that it was deadlocked, confused, or unable to reach verdict." (*See* appellee's brief, 16-17.)

{¶ 21} "It is within the sound discretion of the trial court to provide supplemental instructions in response to a question from the jury." *State v. Campbell*, 10th Dist. No. 07AP-1001, 2008-Ohio-4831, ¶ 11, citing *State v. Thompson*, 10th Dist. No. 97APA-04-489, 1997 WL 710446, citing *State v. Maupin*, 42 Ohio St.2d 473 (1975). "The trial court's response, when viewed in its entirety, must constitute a correct statement of the law and be consistent with or properly supplement the jury instructions that have already been given." *Campbell.* " 'A reversal of conviction based upon a trial court's response to such a request requires a showing that the trial court abused its discretion.' " *Id.*, citing *State v. Young*, 10th Dist. No. 04AP-797, 2005-Ohio-5489, ¶ 35, quoting *State v. Carter*, 72 Ohio St.3d 545, 553 (1995). An abuse of discretion connotes more than an error of law, it implies that the trial court's decision was unreasonable, arbitrary, or unconscionable." *Campbell*, citing *State v. Widder*, 146 Ohio App.3d 445 (9th Dist.2001).

{¶ 22} In its jury instruction, the trial court stated:

> In Count 1 of the indictment, [appellant] is charged with having committed Theft against the Ohio Department of Jobs and Family Services, commonly referred to as ODJFS. Before you can find the [appellant] guilty, you must find beyond a reasonable doubt that in Franklin County, Ohio, from on or about July 18, 2005, to on or about July 28, 2009, the [appellant], with purpose to deprive the owner of funds, knowingly caused an organization, 1st Advanced Transportation, to obtain these funds by deception.
>
> * * *
>
> A person acts knowingly regardless of his purpose when he is aware that his conduct will probably cause a certain result. A person has knowledge of circumstances when he is aware that such circumstances probably exist. Since you cannot look into

> the mind of another individual, knowledge is determined through an assessment of all the facts and circumstances in evidence.

(Tr. 434-35.)

{¶ 23} During its deliberation, the jury submitted the following question to the trial court: "[w]e have several jurors undecided because it's unclear as to whether [appellant's] knowledge or understanding of right and wrong is relevant in this case. That is to say, in simplest terms, is it relevant as to whether [appellant] knew what he was doing was wrong." (Tr. 452.) Prior to answering the jury's question, the trial court allowed counsel for the state and counsel for appellant to provide input regarding its response. Counsel for the state argued:

> I believe that the jury instructions [themselves] have set forth the definition for "knowledge," which is actually a key element that we have to provide the jurors with in that they are, in effect, perhaps asking us to decide knowledge for them, and I don't think we should. I think we should tell them to refer to the definitions that have been provided them in the jury instructions and make a determination as to what they believe the knowledge is in this case.

(Tr. 453.) Counsel for appellant argued:

> Your Honor, obviously they're looking to the Court for guidance, and you're certainly not confined to the instructions when answering the question. Clearly they are hung up on the most critical element of the case, and that is the mens rea. And I believe it is appropriate for the Court to correctly state the law, which is, yes, the government must prove beyond a reasonable doubt the [appellant] had knowledge that what he was doing was violative of the law. And that's the cornerstone of the justice system. Why run away from it?

(Tr. 453.) In response, the trial court stated:

> Okay. What I have here is, Page 5 and 6 sets forth what is required to prove the offense. The State has the burden of proving each and every element beyond a reasonable doubt, including the "knowing" and "purpose" aspects of the charge.

(Tr. 453-54.) Counsel for the state agreed with the trial court's proposed answer. (Tr. 454.) However, counsel for appellant argued that, because the jury specifically asks "does [appellant] have to know what he was doing was wrong, * * * the answer to that question has to be yes." (Tr. 454.) Upon allowing counsel to expound upon their arguments, the trial court then stated:

> Okay. I don't want to say yes for a reason because that gives the sponsorship by the Court, but I will say the following. I'm going to change it to read as follows: The State has the burden of proving each and every element beyond a reasonable doubt, including the [appellant] knowingly and purposely committed the offense as charged.

(Tr. 456-57.) Again, appellant's counsel objected stating that: "[The jury] is asking for simply put. They're asking for simple guidance. They're saying tell me, tell me, Judge, does the [appellant] have to know what he was doing was wrong? The answer's, of course, he does." (Tr. 458.) Over appellant's counsel's objection, the trial court issued the following answer to the jury:

> Page 5 and 6 sets forth what is required to prove the offense. The State has the burden of proving each and every element beyond a reasonable doubt, including the [appellant] knowingly and with purpose committed the offense as charged. You must find actual knowledge that his actions caused the wrong.

(Tr. 459.) Subsequently, the trial court, sua sponte, issued an addendum answer amending the last sentence of its response to read: "[y]ou must find actual knowledge that [appellant] *knew his actions would cause the wrong*." (Emphasis added.) (Tr. 461.) The record indicates that appellant's counsel agreed with the trial court's addendum answer and stated, "[t]hat's a correct statement of law." (Tr. 461.)

{¶ 24} Based upon the foregoing, we cannot find that the trial court issued an unreasonable, arbitrary, or unconscionable answer to the jury's question regarding appellant's requisite mens rea. Therefore, we find that the trial court did not abuse its discretion.

{¶ 25} Appellant's second assignment of error is overruled.

{¶ 26} In his third assignment of error, appellant argues that the jury's verdict of guilty was against the manifest weight of the evidence. In support of this argument,

appellant contends that the state failed to prove every element of the crime charged and that an accurate reading of the record reveals that appellant is not guilty of the offense. (*See* appellant's brief, 15.) Specifically, appellant submits that the state was not able to offer any significant evidence demonstrating that appellant knew he was deceiving Medicaid at the time he submitted the improper billings. (*See* appellant's brief, 17.)

{¶ 27} In response, the state argues that, based upon the testimony of Agent Kalas and Blake, and the four and one-half hour audio recording of appellant's interview with Agent Kalas presented to the jury as State's Exhibit J-1, the weight of the evidence supports appellant's conviction. (*See* appellee's brief, 18-20.) Specifically, the state noted Agent Kalas's and Blake's testimony regarding appellant's knowledge of Medicaid billing rules with respect to the ambulette business. (*See* appellee's brief, 18-19.) The state also noted appellant's recorded statements from the interview with Agent Kalas which referred to appellant's "knowledge that Medicaid recipients had to be transported in wheelchairs." (*See* appellee's brief, 20; *see also* State's Exhibit J-1.)

{¶ 28} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a "thirteenth juror" and, after " 'reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.' " *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997), quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). Reversing a conviction as being against the manifest weight of the evidence should be reserved for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin*.

{¶ 29} Further, a defendant is not entitled to a reversal on manifest-weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶ 21. The determination of weight and credibility of the evidence is for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230 (1967). The rationale is that the trier of fact is in the best position to resolve conflicts in evidence, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimony is credible. *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶ 57.

The trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Jackson*, 10th Dist. No. 01AP-973, 2002-Ohio-1257; *State v. Sheppard*, 1st Dist. No. C-000553, 2001 WL 1219765. Consequently, although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must give great deference to the fact finder's determination of the witnesses' credibility. *State v. Covington*, 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶ 22; *State v. Hairston*, 10th Dist. No. 01AP-1393, 2002-Ohio-4491, ¶ 17; *State v. Bankston*, 10th Dist. No. 08AP-668, 2009-Ohio-754, ¶ 5-6.

{¶ 30} Pursuant to R.C. 2913.02(A)(3), "[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 in any of the following ways: * * * [b]y deception." *See* R.C. 2913.02(A)(3). R.C. 2913.01(A) defines deception as "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 creates, confirms, or perpetuates a false impression in another, including a false impression as to law, value, state of mind, or other objective or subjective fact." Further, pursuant to R.C. 2901.22(B), "[a] person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶ 31} Here, appellant contends that his conviction is against the manifest weight of the evidence because the state was not able to offer any significant evidence demonstrating that appellant knew he was deceiving Medicaid at the time he submitted the improper billings. (*See* appellant's brief, 17.) We disagree.

{¶ 32} Blake testified that she worked as an EMT Director at 1st Advanced Transportation from 2006 to 2008 and that, during that time, she saw appellant's ambulettes picking up patients at the dialysis center without wheelchairs. The following testimony ensued:

> Q. During those occasions, would you see those recipients in wheelchairs?

> A. No. The ones that I'm familiar with, [appellant] had two dialysis centers that he did mainly everything for, and there was a couple that we picked up on squad because the wheelchairs didn't run that late, so I would see those two. And then I would see the other ones would be sitting in the chair, and they'd walk them out to their truck.
>
> Q. Okay. Did that concern you at all?
>
> A. Yeah. I talked to [appellant] about it.
>
> * * *
>
> Q. Okay. You had a conversation with the [appellant].
>
> A. Yes.
>
> Q. After that conversation, what did he tell you?
>
> A. That it was none of my business, I was to run the EMS side and not the wheelchair side.
>
> Q. Did he express to you that he knew the rules?
>
> A. Yes, he knew the rules.
>
> Q. What did he say?
>
> A. He said that as long as he got a doctor to sign off on it, on the PCF, the Physician Certificate Form, that it didn't fall back on him. It fell back on the doctor.

(Tr. 123, 128-29.)

{¶ 33} Agent Kalas, special agent with the Attorney General's Office, testified that he has been involved in approximately 30 investigations regarding ambulettes. Agent Kalas opened a case against 1st Advanced Transportation due to an anonymous complaint regarding the ambulance side of the operation, wherein someone alleged that individuals were "either walking on or off the ambulance, and there was concern if somebody needs that ambulance they should be laying in the cot and transported to or from wherever." (Tr. 192.) Agent Kalas testified:

> Q. Are you familiar with the rules and regulations regarding ambulettes as well based in your experience on investigating these cases?
>
> A. Yes.
>
> * * *
>
> Q. [With] regard to the Medicaid rules, will the Medicaid program pay for transportations without wheelchairs—
>
> A. No.
>
> Q. – to medical appointments?
>
> A. Well, unless it was done by ambulance. But as far as—or airplane or helicopter as somebody had mentioned.
>
> Q. But in order to be paid through the Medicaid program and billed as an ambulette transport, does the individual recipient have to be in a wheelchair?
>
> A. Yes.

(Tr. 198-99.)

{¶ 34} As part of his investigation, Agent Kalas interviewed a number of Medicaid recipients, including Vasiliy and Ida Mamontov, Awanna Mock, Shon Perry, Deborah Reeves, Carlos Regalado, Tracy Richardson, Irina Arie, Sof'ya Krasinskoya, Ettya Bulkovshteyn, Asya Kaplan, and Zelda Freger.

{¶ 35} In addition, on March 12, 2009, Agent Kalas, along with Agent Abhijit Dixit ("Agent Dixit"), interviewed appellant at 1st Advanced Transportation. Agent Kalas identified State's Exhibit J-1 as the audio recording of appellant's interview lasting approximately four and one-half hours in duration. Agent Kalas testified that, during the interview, appellant stated he got the business up and running around March of 2004, and he subsequently applied to get his Provider Agreement and certification through the Ohio Medical Transportation Board. Further, Agent Kalas testified that appellant stated that "he was responsible for the billing from the beginning of the business up until about two years prior to our interview in March of '09." (Tr. 219.) With regard to appellant's involvement in setting up the business, Agent Kalas testified:

> [Appellant] mentioned that he researched the company—or he researched the ambulette business and the Medicaid requirements on line and he did some follow-up telephone calls to the Medicaid department and followed by a trip actually down to the Department of Job and Family Services. [Appellant] stated that it was at the location at Main and Grant, and he stated that he met with Ed Zachriach to fill out the Provider application.

(Tr. 223.) Further, with regard to appellant's involvement in the Medicaid billing process, Agent Kalas testified:

> Initially [appellant] stated that he submitted the billings, and he was very proud of the fact that he proclaimed he knew the rules very well due to the fact that he did his homework, the on-line searches, the telephone conversations, and the subsequent visit down to the offices to learn that. And he had indicated that he was the one that was responsible that was doing the billings initially.

(Tr. 224.)

{¶ 36} Finally, in response to questioning about appellant's knowledge regarding Medicaid requirements for ambulettes and why appellant transported individuals without wheelchairs, Agent Kalas testified:

> Q. Did you also talk to [appellant] about the OMTB?
>
> A. Yes, I did.
>
> Q. And what is that?
>
> A. It's the Ohio Medical Transportation Board.
>
> Q. And did he recall that process?
>
> A. He did.
>
> Q. And what did he say with regard to that?
>
> A: [Appellant] knew the requirements of the ambulette. He knew that there was different types of ambulettes, being that there could be, like, minivans, if you will, that had a mechanical lift that would accommodate typically one person seated in a wheelchair.

He indicated he liked the much sturdier, heavier duty, more like a one-ton F-350 van, which would be the ambulette. And he knew that there was certain height requirements, that it had a taller ceiling than a normal van. He knew it had a mechanical lift.

He knew that the purpose of an ambulette van was designed to transport one or more persons seated in wheelchairs, strapped in wheelchairs, and he acknowledged that the larger, like the F-350, for instance, the one-ton ambulette, was capable of transporting more than one individual seated in a wheelchair at a time.

* * *

I found him to be knowledgeable both about the rules as they pertain to Medicaid and as far as the rules as they pertain to the OMTB. He was able to provide names, manners in which he went about setting up the business. He had a commanding knowledge of what the requirements were, the basic premise of the ambulette company, and he was able to explain that in great detail.

Q. Okay. When you first started talking about transporting people with wheelchairs, did [appellant] admit to you that he had transported people without wheelchairs?

A. Not initially, no.

Q. What did he say?

* * *

A. * * * [Appellant] initially stated that he knew one of the requirements to be transported and bill—one of the requirements to bill the Medicaid program for a wheelchair transport is it had to be to or from a Medicaid-paid health service, like some sort of medical appointment, and it had to be done so in a vehicle that was certified by the Ohio Medical Transportation Board that met the requirements of transporting somebody in a wheelchair and the person had to be transported in that manner and that if he had not done it in that manner that it would not be a proper transport, that it would be an illegal transport, that—when I asked him in another point in the interview if he knew if anyone in his company had transported any individuals that were not

> seated in wheelchairs, he stated, "I'm not the driver. I do not know."
>
> As the interview progressed, he did acknowledge that there were, in fact, times that on a few—a couple of occasions he transported individuals that were not seated in wheelchairs, but he thought, he claimed, that he did not bill on those occasions. * * *
>
> Q. * * * When [appellant] did acknowledge that he had transported people without wheelchairs, did you talk about specific recipients?
>
> A. I did.
>
> Q. Did you talk about Awanna Mock?
>
> A. Yes.
>
> Q. And * * * what did he say with regard to Awanna Mock?
>
> A. He indicated that he knew that he had personally transported her. He indicated that he knew that she was blind and that for safety reasons that was the reason that she was transported by ambulette.
>
> When I asked him at some point in the interview if he knew of anybody specifically that was never transported in a wheelchair, he stated, yes, Awanna Mock. He stated that she, unlike some of the other individuals, was—the word I believe he used—the word he used was "powerful." I ascertained that maybe he meant "independent." He said yes, she's independent. She can walk. She requires assistance, but she's able to walk, and he acknowledged that she was one of the individuals that had never ridden in a wheelchair.

(Tr. 226-29.) Agent Kalas further testified:

> Q. Thank you. Now, did [appellant] talk to you about why he transported people without wheelchairs?
>
> A. He did.
>
> Q. And what did he say?

> A. Initially he stated that—well, the reason he stated why he transported individuals without wheelchairs, again, is that he stated that is what they requested at one point.
>
> He also stated that in the beginning there was two drivers, himself and another individual. He said that they would get overscheduled. He stated that—he made a contradictory statement and stated to take—to an earlier statement to where initially he stated to me that, yes, some of these individuals could walk, but it took an extreme amount of time to get them in the car. It wasn't safe to them. It wasn't in their best health efforts to transport—it was quicker to put them in a wheelchair and transport them that way.
>
> Later he contradicted himself and said that they would get overscheduled. He would receive an enormous amount of known calls that people were waiting a hour, two hours, whatever the case may be. He gave a specific time, too. It was a specific amount of time people were waiting, and it was stressful to him.
>
> And the best result was, to expedite things, to speed the process up, that he would pick them up and place them in the ambulette, not in a wheelchair, because it was—it would take too much time to strap them down and put them in a wheelchair. It was quicker just to place them into the ambulette. Or on occasions where he had to transport them in his personal vehicle, he stated it was, again, because they got overbooked, overscheduled, had to go out to provide good service. He wanted to get the people home. He didn't want them waiting any longer than they had to be.

(Tr. 236-37.)

{¶ 37} In addition to the testimony of Blake and Agent Kalas regarding appellant's knowledge of the Medicaid rules, the state also provided the jury with State's Exhibit J-1, the March 12, 2009 full recording of appellant's interview with Agent Kalas. Although the state did not play this recording during the trial, the jury had the opportunity to listen to the recording as part of its deliberations.

{¶ 38} On the tape, appellant explained to Agent Kalas, without any qualifications as to when he acquired his knowledge, that he knew ambulette riders had to be

transported in a wheelchair in order to bill Medicaid for the services.[2] Further, appellant admitted that Awanna Mock was never transported in a wheelchair but that he continued to bill Medicaid for her transport. In response to Agent Kalas's assertion that appellant had billed approximately $31,000 for Awanna Mock, appellant did not deny it and replied "possibly." "I made a mistake, I admit it."[3]

{¶ 39} As previously stated, "[t]he determination of weight and credibility of the evidence is for the trier of fact." *State v. Shamblin*, 10th Dist. No. 06Ap-249, 2006-Ohio-6001, ¶ 22. Further, "[t]he trier of fact is free to believe or disbelieve all or any of the testimony." *Id*.

{¶ 40} Here, based upon the testimony of Blake and Agent Kalas and State's Exhibit J-1, the jury could have reasonably believed that appellant knew at the time he started operating 1st Advanced Transportation in 2004 that, in order to bill Medicaid for services, ambulette clients had to be transported in wheelchairs. First, Blake testified that as one of appellant's employees from 2006 through 2008, she witnessed ambulette transports done without wheelchairs. In addition, Blake testified that, when she attempted to address her concerns with appellant, he stated that it was none of her business, and that she was to run the EMS side and not the wheelchair side. Finally, Blake testified that appellant "knew the rules." (Tr. 129.) Second, Agent Kalas testified that appellant was "knowledgeable both about the rules as they pertain to Medicaid and as far as the rules as they pertain to the OMTB. He was able to provide names, manners in which he went about setting up the business. He had a commanding knowledge of what the requirements were, the basic premise of the ambulette company, and he was able to explain that in great detail." (Tr. 227.) Third, during his recorded interview with Agent Kalas, appellant stated that he knew: (1) the sole purpose of an ambulette was to transport people to doctor's appointments and dialysis; (2) patients had to be transported in a wheelchair and strapped in; (3) he could only bill for services provided; and (3) Awanna Mock and other patients were not transported in a wheelchair. However, contrary to his testimony at trial, during the recorded interview, appellant never told Agents Kalas or

[2] State's Exhibit J-1, at 11 minutes, 9 seconds and 12 minutes, 22 seconds (these are approximations of time as this audio CD was not transcribed).
[3] State's Exhibit J-1, at 3 hours, 6 minutes to 3 hours, 9 minutes (these are approximations of time as this audio CD was not transcribed).

Dixit that he only found out about the wheelchair requirement when he learned about the investigation of 1st Advanced Transportation.

{¶ 41} Therefore, based upon the record before us, we cannot say that the jury clearly lost its way in finding appellant guilty of theft by deception, or that appellant's conviction is against the manifest weight of the evidence.

{¶ 42} Appellant's third assignment of error is overruled.

{¶ 43} Having overruled all three of appellant's assignments of error, the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

SADLER and CONNOR, JJ., concur.

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