[Cite as *State v. Talkington*, 2009-Ohio-6229.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-T-0111**
- vs -	:	
DAVID N. TALKINGTON,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 07 CR 637.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Michael A. Partlow, Morganstern, MacAdams & DeVito Co., L.P.A., 623 West St. Clair Avenue, Cleveland, OH 44113 (For Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Mr. David N. Talkington appeals from the judgment of the Trumbull County Court of Common Pleas, entered upon a jury verdict finding him guilty of forgery, a felony of the fifth degree, for attempting to file a forged tax document with the city of Warren to evade paying taxes owed.

{¶2} On appeal, Mr. Talkington contends the evidence is insufficient to support his conviction because the state did not introduce any evidence that he purposefully or

knowingly attempted to file the forged document. Mr. Talkington also contends that the manifest weight of the evidence does not support his conviction because there is no evidence that he retrieved the fraudulent W-2 form from the Social Security Administration ("SSA") website, which anyone can access. Thus, he argues, there is nothing beyond mere speculation to support his conviction.

{¶3} We disagree with Mr. Talkington's contentions. First, the state introduced sufficient evidence by way of testimony from his employer, the city tax officials, and his tax preparer that Mr. Talkington, at the very least, knowingly attempted to file a fraudulent W-2 form. Second, the manifest weight of the evidence weighs heavily in a finding of guilt as the state introduced ample evidence that the jury was free to believe and Mr. Talkington chose not to challenge. Thus, we find his assignments of error are without merit and affirm.

{¶4} **Substantive and Procedural History**

{¶5} On April 17, 2007, the last day for filing taxes for the 2006 tax year, Mr. Talkington attempted to file two W-2 tax forms purportedly from his employer, Kraftmaid, at the City of Warren Income Tax Department. One of the W-2s was larger than the other and documented that the city of Warren taxes were withheld for the 2006 tax year. Ms. Lori Graham, the cashier and auditor who was serving Mr. Talkington, immediately became suspicious. Ms. Graham was familiar with Kraftmaid's W-2 forms from processing Kraftmaid's forms from previous years. She was aware that employees were typically given one W-2, small in size, and that Kraftmaid only withheld taxes for the city of Middlefield. Upon questioning Mr. Talkington about the larger form that

purportedly documented taxes withheld for the city of Warren, Mr. Talkington became argumentative, remarking that he should not have to pay taxes twice.

{¶6} Before continuing to process his return, Ms. Graham showed the forms to Ms. Sharon Woodward, the tax office investigator who takes care of withholding accounts for employers for the city. Through their conversation, Ms. Graham discovered that Kraftmaid did not withhold taxes for the city of Warren and, in fact, it did not have a withholding account with the city. She noted on Mr. Talkington's form (where he had indicated he owed no taxes) that he owed $489.61 to the city of Warren. After requesting the forms be returned to him, Mr. Talkington agreed to pay the taxes, but did not do so on that day.

{¶7} Ms. Graham had made copies of Mr. Talkington's forms and several days later, began an investigation. She discovered that anyone can access W-2 forms on the SSA website, and found the same form that Mr. Talkington had tried to file. She also reviewed his filings for the three years prior (2003, 2004, and 2005), which documented that in previous years his wages were withheld only for the city of Middlefield, and that he owed the difference in the tax rate between the two cities each year, which he duly paid.

{¶8} Ms. Woodward also investigated the matter further after Ms. Graham brought the forms to her attention. After faxing Kraftmaid Mr. Talkington's forms, she called Kraftmaid to double-check its withholding accounts. Kraftmaid confirmed it did not have a withholding account for the city of Warren, and returned Mr. Talkington's copies. Kraftmaid indicated the first form, which purported to withhold taxes for the city of Warren, was not generated by the company, and confirmed the second form, which

withheld taxes for the city of Middlefield, was the correct form that was mailed to employees.

{¶9} Ms. Dawn Suddeth, the payroll and benefits manager for Kraftmaid, also personally investigated the case and confirmed that the form was not the form generated for Kraftmaid. Its payroll company, Automatic Data Processing Cleveland Co. ("ADP") generates and directly sends the W-2s to SSA electronically. Thus, there was no way the form could have been accidentally mailed to Mr. Talkington as he suggested.

{¶10} Mr. Ted Kluck, the human resource generalist for Kraftmaid, spoke directly with Mr. Talkington about the two forms. Mr. Talkington relayed that his tax preparer, Mr. Koren, gave him both forms to file. Mr. Koren, however, testified that Mr. Talkington gave him both forms. Although it was unusual, Mr. Koren did not question the authenticity of the document or inquire further, despite the fact that the city of Warren W-2 looked like a SSA W-2 and not like the W-2 Kraftmaid form for withholding taxes for the city of Middlefield given to employees. The SSA W-2 was larger in size, and explicitly stated on the bottom that the form "was for the Social Security Administration only."

{¶11} After the state's case-in-chief, Mr. Talkington's motion for acquittal pursuant to Crim.R. 29 was denied, and the defense rested. The jury returned a guilty verdict on the count of forgery, a felony of the fifth degree, in violation of R.C. 2913.31(A)(3)&(C)(1), and the matter was referred for a presentence investigation.

{¶12} Mr. Talkington was sentenced to serve five years of community control, with the following specified conditions: (1) payment of court costs; (2) DNA testing; (3)

restitution, if any is due, to the City of Warren Income Tax Department; (4) no alcohol or drugs with random drug testing by the Trumbull County Adult Probation Department; as well as (5) a $20 monthly probation supervision fee.

{¶13} It is from this judgment of conviction and sentence that Mr. Talkington now timely appeals, raising the following two assignments of error:

{¶14} "[1.] The Appellant's conviction was not supported by sufficient evidence.

{¶15} "[2.] The Appellant's conviction is against the manifest weight of the evidence."

{¶16} **Sufficiency of the Evidence**

{¶17} In his first assignment of error, Mr. Talkington contends that the evidence is insufficient to support his conviction because the state failed to introduce evidence that he prepared the forged document for the purpose of committing fraud. Specifically, he argues that his tax preparer, Mr. Koren, did not question the document, and that as Ms. Woodward indicated, anyone could have pulled his SSA form from the internet. Thus, he argues it is pure speculation as to whether he had a purpose or even knew he was committing fraud. Mr. Talkington's first assignment of error is wholly without merit.

{¶18} "As this court stated in *State v. Schlee* (1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, 13, the standard of review for a sufficiency of the evidence claim is 'whether after viewing the probative evidence and the inference[s] drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found from all the elements of the offense beyond a reasonable doubt. The claim of insufficient evidence invokes an inquiry about due process. It raises a question of law, the resolution of which does not allow the court to weigh the evidence. ***'

(Citations omitted.) 'In essence, sufficiency is a test of adequacy[;] [w]hether the evidence is legally sufficient to sustain a verdict ***.'" *State v. Davis*, 11th Dist. No. 2008-L-021, 2008-Ohio-6991, ¶68, quoting *State v. Reeds*, 11th Dist. No. 2007-L-120, 2008-Ohio-1781, ¶70, citing *State v. Pesec*, 11th Dist. No. 2006-P-0084, 2007-Ohio-3846, ¶45, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. "Thus, sufficiency of the evidence tests the burden of production." Id., quoting *Reeds*, citing *Pesec*, citing *Thompkins* at 390.

{¶19} Mr. Talkington challenges the sufficiency of the evidence that he knowingly and with purpose attempted to file a fraudulent tax document. The evidence presented by the state, however, is more than sufficient to sustain a finding that Mr. Talkington knowingly and with purpose attempted to file a fraudulent tax document to evade paying taxes that were due and owing to the city of Warren.

{¶20} Mr. Talkington was convicted on one count of forgery pursuant to R.C. 2913.31, which states, in relevant part:

{¶21} "(A) No person, with purpose to defraud, or knowing that the person is facilitating a fraud, shall do any of the following:

{¶22} "***

{¶23} "(3) Utter, or possess with purpose to utter, any writing that the person knows to have been forged."

{¶24} Furthermore, "Forgery" and "uttering" are defined in R.C. 2913.01 as:

{¶25} "(G) 'Forge' means to fabricate or create, in whole or in part and by any means, any spurious writing, or to make, execute, alter, complete, reproduce, or

otherwise purport to authenticate any writing, when such writing in fact is not authenticated thereby.

{¶26} "(H) 'Utter' means to issue, publish, transfer, use, put or send into circulation, deliver, or display." See, also, *State v. McGhee* (1987), 37 Ohio App.3d 54, 57.

{¶27} Mr. Talkington argues that because Mr. Koren did not question the authenticity of the documents and because Ms. Woodward, herself, testified that anyone can pull such records from the SSA website, the state failed to carry its burden of production of the evidence in proving that he "knowingly" or "with purpose" attempted to file the fraudulent tax document. These arguments do not go to the sufficiency of the evidence, but rather, the manifest weight of the evidence, which we address in his second assignment of error. As we noted in *Davis*, "[i]n reviewing the sufficiency of the evidence, the relevant inquiry is whether the state has presented evidence on each element of the crime. In contrast, ***, manifest weight contests the believability of the witnesses." Id. at ¶71, quoting *Reeds* at ¶82, citing *State v. Johnson*, 11th Dist. No. 2006-L-259, 2007-Ohio-5783, ¶35.

{¶28} The state presented uncontroverted evidence that Mr. Talkington gave two W-2 forms to Mr. Koren, one of which was unusual in size and purported to withhold taxes from the city of Warren. When questioned about the source of the purported Kraftmaid W-2 forms, Mr. Talkington reported that Mr. Koren gave him both forms. Mr. Koren, however, testified that Mr. Talkington gave him both forms and that he did not question them further. Mr. Talkington then took both forms and attempted to file them with the city of Warren. When questioned by the city officers, he asked for the forms

back. Surely, the state introduced sufficient evidence from which the jury could find that Mr. Talkington, knowingly and with purpose to defraud, attempted to file a false W-2, purporting it to be a real document issued by his employer to his tax preparer and the city officers, meeting the very definition of to "forge" and to "utter" pursuant to R.C. 2913.01.

{¶29} In any case, "[i]n analyzing a motion for acquittal, the reviewing court is bound to view the evidence presented in a light most favorable to the state, not to assess the credibility of the witnesses." *Davis* at ¶73, quoting *Reeds* at ¶81, citing *Johnson* at ¶34, citing *State v. Jenks*, 61 Ohio St.3d 259, 273.

{¶30} As the state more than met its burden of production by introducing evidence that Mr. Talkington knowingly attempted to commit forgery, Mr. Talkington's first assignment of error is without merit.

{¶31} **Manifest Weight of the Evidence**

{¶32} In his second assignment of error, Mr. Talkington raises similar arguments as he contends that his conviction is against the manifest weight of the evidence. Mr. Talkington asserts that in order for the jury to have reached their verdict, they were required to stack inference upon inference that he attempted to file a fraudulent tax document. Thus, he argues it is pure speculation whether he knowingly attempted to file the document, or whether it was an innocent error as he suggests. Mr. Talkington's second assignment of error is without merit as the manifest weight of the evidence weighs heavily in support of the jury's finding of guilt. There is, quite simply, no evidence of an error, innocent or otherwise.

{¶33} "When reviewing a claim that a judgment was against the manifest weight of the evidence, an appellate court must review the entire record, weigh both the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether in resolving conflicts, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that a new trial must be ordered." *Davis* at ¶77, quoting *State v. Armstrong*, 11th Dist. No. 2007-G-2756, 2007-Ohio-6405, ¶15, citing *Pesec* at ¶74, citing *State v. Floyd*, 11th Dist. No. 2005-T-0072, 2006-Ohio-4173, ¶8, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. See, also, *Thompkins* at 387.

{¶34} "The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." Id. at ¶78, quoting *Armstrong* at ¶16, citing *Pesec* at ¶75, citing *Floyd* at ¶9, citing *Martin* at 175. "The role of the appellate court is to engage in a limited weighing of the evidence introduced at trial in order to determine whether the state appropriately carried its burden of persuasion." Id., quoting *Armstrong* at ¶16, citing *Floyd* at ¶9, citing *Thompkins* at 390 (Cook, J., concurring). "The reviewing court must defer to the factual findings of the trier of fact as to the weight to be given the evidence and the credibility of the witnesses." Id., quoting *Armstrong* a ¶16, citing *Floyd* at ¶9, citing *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶35} Based upon the evidence and testimony the state presented, we cannot conclude that the jury lost its way or created a manifest miscarriage of justice when it convicted Mr. Talkington of forgery. The evidence reflects that Mr. Talkington gave his tax preparer two W-2 forms instead of the usual one. He told Mr. Koren he received them both from Kraftmaid. In turn, he told his employer, Kraftmaid, that he received

them from Mr. Koren. Mr. Talkington then attempted to file the fraudulent document, and when questioned by the tax department officer, who was familiar with Kraftmaid's practices, he attempted to take back the forms and pay the taxes that had already been supposedly withheld. The city of Warren further investigated the matter and confirmed that Kraftmaid did not withhold taxes for the city of Warren nor did it have a withholding account. The city also discovered that anyone can print out a tax form from the SSA website and that Mr. Talkington had directly paid his city of Warren taxes in the previous three years.

{¶36} Quite simply, the conviction is more than supported by the weight of the evidence. Mr. Talkington introduced no evidence of an error, innocent or otherwise. Whether it is pure "speculation" that Mr. Talkington knew he had a fraudulent tax document was for the jury to decide, since "[i]t is well-settled that when assessing the credibility of witnesses, '[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact.'" Id. at ¶83, quoting *Armstrong* at ¶16, citing *State v. McKinney Jr.,* 11th Dist. No. 2006-L-169, 2007-Ohio-3389, ¶49, citing *State v. Grayson*, 11th Dist. No. 2006-L-153, 2007-Ohio-1772, ¶31, citing *State v. Awan* (1986), 22 Ohio St.3d 120, 123.

{¶37} The jury was free to believe the evidence and testimony the state presented. Moreover, there is nothing to suggest the jury lost its way or that such a manifest miscarriage of justice occurred that a new trial is warranted.

{¶38} Mr. Talkington's second assignment of error is without merit.

{¶39} The judgment of the Trumbull County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

{¶40} I respectfully dissent.

{¶41} The majority finds no error in appellant's conviction of forgery/uttering. I disagree.

{¶42} R.C. 2913.31 provides in part:

{¶43} "(A) No person, with purpose to defraud, or knowing that the person is facilitating a fraud, shall do any of the following:

{¶44} "(1) Forge any writing of another without the other person's authority;

{¶45} "(2) Forge any writing so that it purports to be genuine when it actually is spurious, or to be the act of another who did not authorize that act, or to have been executed at a time or place or with terms different from what in fact was the case, or to be a copy of an original when no such original existed;

{¶46} "(3) Utter, or possess with purpose to utter, any writing that the person knows to have been forged."

{¶47} "Forgery" is defined as:

{¶48} "1. The act of fraudulently making a false document or altering a real one to be used as if genuine. *** 2. A false or altered document made to look genuine by someone with the intent to deceive. *** 3. Under the Model Penal Code, the act of

fraudulently altering, authenticating, issuing, or transferring a writing without appropriate authorization. *** 'While it is true that there is a distinction between fraud and forgery, and forgery contains some elements that are not included in fraud, forgeries are a species of fraud. In essence, the crime of forgery involves the making, altering, or completing of an instrument by someone other than the ostensible maker or drawer or an agent of the ostensible maker or drawer.' 37 C.J.S. *Forgery* [Section] 2, at 66 (1997)." Black's Law Dictionary (8 Ed.1999) 677.

{¶49} In the case at bar, the record does not establish that appellant "knew" that the W-2 at issue was forged or contained any irregularity whatsoever until he was told so by an employee of the tax department. Further, there was no evidence that appellant had any "purpose to defraud" or knew he was "facilitating a fraud." At best, the state's evidence merely showed that appellant *could have had* a purpose to defraud or *could have known* that he was facilitating a fraud. Appellant's accountant had no idea where the W-2 form came from and did not catch any mistakes. Testimony revealed that *anyone* may obtain a copy of this form off the Internet. There was no showing that appellant actually did so. Also, there was no evidence that appellant knew that the W-2 had been forged.

{¶50} Although appellant could have possibly been indicted for fraud or tax evasion, this writer believes he was wrongly indicted for and convicted of forgery/uttering.

{¶51} For the foregoing reasons, I dissent.