**[Cite as *State v. Malone*, 2016-Ohio-3543.]**

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

| | | |
|---|---|---|
| STATE OF OHIO, | : | |
| Plaintiff-Appellee, | : | Case No. 14CA3648 |
| vs. | : | |
| MICHAEL ANTONIO MALONE, SR., | : | DECISION AND JUDGMENT ENTRY |
| Defendant-Appellant. | : | |

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APPEARANCES:

Bryan Scott Hicks, Portsmouth, Ohio, for appellant.

Mark E. Kuhn, Scioto County Prosecuting Attorney, and Shane A. Tieman, Scioto County Assistant Prosecuting Attorney, Portsmouth, Ohio, for appellee.

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CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 6-16-16
ABELE, J.

{¶ 1} This is an appeal from a Scioto County Common Pleas Court judgment of conviction and sentence. A jury found Michael Antonio Malone, Sr., defendant below and appellant herein, guilty of (1) theft from an elderly person in violation of R.C. 2913.02(A)(1)/(B)(1)&(3); (2) forgery in violation of R.C. 2913.31(A)(1)/(C)(1)(c) (iii); (3) forgery in violation of R.C. 2913.31(A)(3)/(C)(1)(c) (iii); and (4) receiving stolen property in violation of R.C. 2913.51(A)&(C).

{¶ 2} Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN ITS ALLIED OFFENSES AND MERGER RULING[.]"

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ABUSED ITS DISCRETION IN ITS RESTITUTION ORDER[.]"

{¶ 3} Samuel McKibbin (McKibbin) and his wife inherited property from Ms. McKibbin's mother in Portsmouth at 1806 Vinton Avenue. The couple moved there for a few years from their Cypress Street home because Ms. McKibbin could better physically navigate the premises. When Ms. McKibbin's condition improved, they returned to their Cypress Street residence and decided to sell the Vinton Avenue home. Knowing that work needed to be done on the residence to ready it for sale, McKibbin hired appellant to perform various improvements.[1]

{¶ 4} Apparently, Mr. McKibbin inadvertently left blank checks at the Vinton Avenue property. After appellant found those checks and after practicing McKibbin's signature, appellant forged more than fifty checks and stole in excess of $83,000 from McKibbin and his wife. McKibbin did not notice this theft until he visited his credit union to engage in estate planning. After remarking that his financial assets seemed much less than he expected, an investigation led authorities to appellant.

[1] McKibbin testified that his wife passed away in 2013 as the events in this case unfolded.

{¶ 5} Subsequently, the Scioto County Grand Jury returned an indictment that charged appellant with the aforementioned offenses. He pled not guilty and the case proceeded to a jury trial.

{¶ 6} At trial, the State introduced into evidence approximately sixty checks, written in various amounts and to various payees (although the overwhelming majority were made to appellant personally), between December 2012 and December 2013. McKibbin testified that the signatures were not his and that when he confronted appellant, appellant apologized and promised to make restitution through his insurance company. Portsmouth Police Detective Michael J. Hamilton also testified that appellant told him that "an unknown mystery person some how got ahold of Mr. McKibbin checks," forged the victim's name and then dropped those checks in appellant's home mailbox. When questioned why he would accept these mystery checks, appellant told the detective "hey, if it's in the mailbox I cash it."

{¶ 7} After hearing the evidence, the jury returned guilty verdicts on all counts. At sentencing, some debate occurred over which counts should merge. The trial court ultimately decided that (1) the theft count would merge with the two forgery counts, (2) the forgery counts would not merge with each other, and (3) the receiving stolen property count would not merge with either forgery count. The court sentenced appellant to serve a four year prison term on the first forgery count, a seven year term on the second forgery count, and eighteen months for receiving stolen property. The court further ordered that the eighteen month sentence be served concurrently with one of the forgery counts, and the two forgery counts be served consecutively to one another for a total of eleven years in prison. Additionally, the court ordered appellant to pay restitution to the victim. This appeal followed.

I

{¶ 8} In his first assignment of error, appellant asserts that the trial court erred in determining which counts should have merged as allied offenses of similar import.

{¶ 9} The determination of whether crimes constitute allied offenses of similar import is a question of law. Thus, appellate courts will review a trial court's determination de novo. *State v. Cole*, 4th Dist. Athens No. 12CA49, 2014-Ohio- 2967, at ¶7; *State v. Greer*, 4th Dist. Jackson No. 13CA2, 2014- Ohio-2174, at ¶8. In other words, an appellate court will afford no deference to a trial court's decision and, instead, conduct an independent review. *Holiday Haven Members Assn. v. Paulson*, 4th Dist. Hocking No. 13CA13, 2014-Ohio-3902, at ¶13; *Bodager v. Campbell*, 4th Dist. Pike No. 12CA828, 2013-Ohio-4650, at ¶19.

{¶ 10} Appellant argues that the trial court erred in regard to two separate mergers issues. We address each separately.

A. The two forgery counts

{¶ 11} Appellant argues that the trial court erred by not merging the two forgery counts as allied offenses of similar import. Count two of the indictment charged appellant with forging McKibbin's name to checks in violation of R.C. 2913.31(A)(1). Count three charged appellant with "uttering" (cashing) forged checks in violation of subsection (A)(3) of that statute.

{¶ 12} Appellant's position is that he could not cash the check without forging it. By contrast, the State argued that forging the check in and of itself, is a complete crime and cashing that check is something altogether different. We point out that neither party has cited any authority to support their respective positions.

{¶ 13} R.C. 2941.25 provides as follows:

> "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶ 14} The Ohio Supreme Court has determined that this statute protects a defendant from receiving multiple punishments for "a single criminal act." See *State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661, at ¶18; *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, at ¶13. In the case sub judice, however, we do not have "a single criminal act." This is not a case in which appellant forged and uttered a single $37,000 check.[2] Instead, a string of more than fifty separate criminal acts, carried out over approximately one year, resulted in the theft of $83,000. In the case sub judice, we believe that the evidence can be viewed in such a way to show that appellant committed forgery and uttering with completely different checks. State's Exhibits four and ten, as well as the testimony of several witnesses, establishes the existence of sufficient evidence to convict appellant on each of the two counts. Insofar as count II (forgery) is concerned, the State introduced into evidence the following checks that the victim claimed he did not sign:

**FROM STATE'S EXHIBIT FOUR**

| **DATE** | **CHECK NO.** | **AMOUNT** |
|---|---|---|

[2] $37,000 is the threshold amount for making forgery and uttering both second degree felonies. See R.C. 2913.31(C)(1)(c)(iii).

| | | |
|---|---|---|
| 2-22-13 | 4253 | $875 |
| 2-22-13 | 4251 | $340 |
| 3-20-13 | 4254 | $875 |
| 3-20-13 | 4274 | $875 |
| 4-13-13 | 4233 | $875 |
| 4-13-13 | 4234 | $875 |
| 4-19-13 | 4240 | $890 |
| 4-19-13 | 4245 | $290 |
| 4-29-13 | 4244 | $890 |
| 5-1-13 | 4231 | $2,290 |
| 5-12-13 | 4241 | $2,290 |
| 5-1-13 | 4229 | $290 |
| 5-13-13 | 4228 | $2,290 |
| 5-15-13 | 4235 | $290 |
| 5-28-13 | 4236 | $1,290 |
| 6-3-13 | 4237 | $2,290 |
| 6-3-13 | 4238 | $1,290 |
| 6-7-13 | 4242 | $1,290 |
| 6-10-13 | 4246 | $2,310 |
| 6-10-13 | 4243 | $2,310 |
| 6-10-13 | 4226 | $1,366.91 |
| 6-24-13 | 4248 | $2,290 |
| 4-13-13 | 4233 | $875 |
| 7-1-13 | 4249 | $2,290 |
| 7-1-13 | 4250 | $2,290 |
| 7-13-13 | 4126 | $2,250 |
| 10-11-13 | 5399 | $3,250 |
| **TOTAL** | | **$38,411.91** |

This evidence establishes that on multiple occasions, appellant forged checks (exceeding the $37,000 limit) in violation of R.C. 2913.31(A)(1)/(C)(1)(c)(iii). Also, between State's Exhibit four and ten, sufficient evidence exists to show that appellant "uttered" completely separate checks as part of a different pattern of misconduct pursuant to R.C. 2913.31(A)(3)/ (C)(1)(c)(iii):

**FROM STATE'S EXHIBIT FOUR AND TEN**

| **DATE** | **CHECK NO.** | **AMOUNT** |
|---|---|---|

| | | |
|---|---|---|
| 10-12-13 | 5402 | $3,250 |
| 10-23-13 | 5417 | $3,200 |
| 10-29-13 | 5400 | $3,200 |
| 11-4-13 | 5401 | $3,290 |
| 11-14-13 | 5423 | $3,290 |
| 11-18-13 | 5422 | $3,290 |
| 11-23-13 | 5420 | $3,290 |
| 11-29-13 | 5421 | $3,190 |
| 12-4-13 | 5424 | $3,290 |
| 12-18-13 | 5429 | $3,290 |
| 12-28-13 | 5434 | $3,290 |
| | | |
| 5-16-13 | 4227 | $1,506.65 |
| 5-22-13 | 4230 | $983.48 |
| 7-13-13 | 4127 | $2,250 |
| **TOTAL** | | **$40,610.13** |

{¶ 13} In short, we believe that evidence of different instances of criminal misconduct exists on different dates, and with different check numbers, to support the convictions under the two subsections of 2923.13(A). Thus, under the circumstances present in this case, we need not determine whether forging and uttering a forged check are allied offense of similar import for purposes of R.C. 2941.25. Rather, the fact remains that multiple separate instances of forgery and "uttering" exist to support each conviction.

B. The Forgery and Receiving Stolen Property Counts

{¶ 14} Appellant's second argument is that the trial court should have concluded that the receiving stolen property charge should merge with one or more of the two forgery charges. The State does not address this particular argument in its brief, but argued at sentencing that after appellant "uttered" the checks (cashed them), he spent the money, which is an act separate from cashing the checks. Indeed, the State seemed to place great emphasis in its argument that none

of the funds from the cashed checks were recovered.[3]

{¶ 15} R.C. 2913.51(A) provides, in part, that "[n]o person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense." The parties agree that as of Spring 2016, the most recent pronouncement of law on allied offenses of similar import is *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892.[4] Ruff states that "[i]n determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must evaluate three separate factors[:] the conduct, the animus, and the import." Id. at paragraph one of the syllabus. "Two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable." Id. at paragraph two of the syllabus. Finally, "[u]nder R.C. 2941.25(B), a defendant whose conduct supports multiple offenses may be convicted of all the offenses if any one of the following is true: (1) the conduct constitutes offenses of dissimilar import, (2) the conduct shows that the offenses were committed separately, or (3) the conduct shows that the offenses were committed with separate animus." Id. This holding appears to be an attempt to improve the Court's previous statements on allied offenses of similar import.

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[3] The State conceded that it had no authority to support its argument.

[4] Although *Ruff* was decided after this case, it is settled law that Supreme Court's decisions are retroactive, and the effect is not that the former was bad law, but that it never was the law. *State v. Creech*, 4th Dist. Scioto No. 12CA3500, 2013- Ohio-3791 at ¶13, fn. 6; also see *Starkey v. St. Rita's Medical Center*, 3rd Dist. Allen 1-96-43, 1997 WL 7204 (Jan. 8, 1997);

{¶ 16} Applying these tests to the facts in the case sub judice, uttering and receiving stolen property in this context are not dissimilar offenses. They involve the same victim (McKibbin), and the "harm" occurred at the time the funds were removed from his account at Desco as a result of the cashed checks. Any recovery of those funds may have mitigated the loss McKibbin suffered, but they did not change the harm the victim suffered when the forged check was uttered.

{¶ 17} We are also not persuaded that the offenses were committed separately. Checks are property. *State v. Purdue*, 6th Dist. Wood No. WD-88-4, 1988 WL 91339 (Sep. 2, 1988). Cash is also property. By stealing McKibbin's blank checks, he has taken the victim's property. In forging and cashing those checks, appellant converted it from one form of property (checks) to another (cash). By spending that money, appellant converted that cash to another form of property. Appellant converted property stolen from McKibbin from one form of property to another. These are not offenses committed separately.

{¶ 18} Finally, there is no separate animus here. Whether it be uttering the forged check, or spending the money he stole from McKibbin's credit union account, the fact remains that appellant's animus was always the same – i.e., to steal from McKibbin and to use that money for appellant's own benefit. We therefore agree with appellant that, in light of the particular facts and circumstances of this case, uttering a forged a check in violation of R.C. 2913.31 (A)(3) and receiving stolen property, in violation of R.C. 2913.51(A) constitute allied offenses of similar import and should have been merged.

{¶ 19} Thus, we must remand this matter to the trial court to merge count four of the

indictment merges with count three.[5] Therefore, we sustain appellant's first assignment of error to this limited extent.

II

{¶ 20} Appellant's second assignment of error concerns the order that appellant pay his victim $53,044.75 in restitution.[6] Appellant argues that Ohio law requires courts to inquire as to the defendant's ability to pay restitution and that the record in the case at bar is bereft of any evidence that the trial court engaged in such an inquiry.

{¶ 21} Generally, a decision to award restitution lies in a trial

{¶ 22} court's sound discretion and its decision will not be reversed absent an abuse of that discretion. See *State v. Shifflet*, 4th Dist. Athens No. 13CA23, 2015-Ohio-4250, 44 N.E.3d 966, at ¶49; *State v. Stump*, 4th Dist. Athens No. 13CA10, 2014-Ohio-1487, at ¶11. In reviewing for an abuse of discretion, appellate courts must not substitute their judgment for that of the trial court. *State ex rel. Duncan v. Chippewa Twp. Trustees*, 73 Ohio St.3d 728, 732, 654 N.E.2d 1254 (1995); *In re Jane Doe 1*, 57 Ohio St.3d 135, 137-138, 566 N.E.2d 1181 (1991).

{¶ 23} In the case sub judice, although we would have preferred more detail in the trial court's reasoning, we believe that the court met the minimum standards to impose the restitution

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[5] The trial court ordered the prison sentence on count four to be served concurrently with the sentence on count two. Although we conclude that count four should merge with count three, this may not affect the aggregate time that appellant was sentenced to serve in prison.

[6] The record indicates that of the $83,515.75 stolen from the victim's account, the credit union reimbursed the victim for approximately $30,050. Presumably, the restitution order represents the remainder of the amount stolen and not reimbursed.

order. While we find no evidence concerning appellant's assets, the record does indicate that appellant owned his own construction company at the time of the offenses, that appellant was born in 1960, and that when his eleven year sentence is satisfied, he will be sixty-five (65) years old. Furthermore, trial counsel did not object to restitution except to the extent that it was made to "a third party." The State and the trial court then agreed that third party restitution is not proper and that restitution should be limited to McKibbin. For these reasons, we overrule appellant's second assignment of error.

{¶ 24} Having sustained a portion of appellant's first assignment of error, we hereby reverse the trial court's judgment concerning the merger of Count four of the indictment with count three. In all other respect, we hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. Appellant shall pay costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. & McFarland, J.: Concur in Judgment Only

For the Court

BY:_____
Peter B. Abele, Judge

**NOTICE TO COUNSEL**

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.