[Cite as *State v. Switzer*, 2009-Ohio-2666.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Sheila G. Farmer, J.
	:	Julie A. Edwards, J.
-vs-	:	
	:	Case No. 2008 CA 0069
CATHERINE SWITZER	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal From Richland County Court Of Common Pleas Case No. 2008 CR 272 D
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 3, 2009

APPEARANCES:

For Plaintiff-Appellee

JAMES J. MAYER, JR.
Prosecuting Attorney
Richland County, Ohio

BY: KIRSTEN L. PSCHOLKA-GARTNER
Assistant Richland County Prosecutor
38 South Park Street
Mansfield, Ohio 44902

For Defendant-Appellant

JOHN C. O'DONNELL
13 Park Avenue West, Suite 300
Mansfield, Ohio 44902

Edwards, J.

{¶1} Defendant-appellant, Catherine Switzer, appeals her conviction and sentence from the Richland County Court of Common Pleas on two counts of obstructing justice. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On April 10, 2008, the Richland County Grand Jury indicted appellant on one count of obstructing justice in violation of R.C. 2921.32(A)(1), a felony of the fifth degree, and one count of obstructing justice in violation of R.C. 2921.32(A)(2), also a felony of the fifth degree. At her arraignment on April 15, 2008, appellant entered a plea of not guilty to the charges. A jury trial was scheduled for June 5, 2008.

{¶3} On May 30, 2008, appellant filed a Motion for Continuance of the June 5, 2008, trial because additional discovery had been requested and her attorney was scheduled for a jury trial in another court. Pursuant to a Judgment Entry filed on June 5, 2008, the jury trial was continued to June 19, 2008. Upon the State's June 11, 2008, motion, the jury trial was rescheduled to July 24, 2008.

{¶4} As memorialized in an Order filed on July 25, 2008, the trial court sua sponte continued the jury trial to August 7, 2008, because the trial court was involved in another trial.

{¶5} On July 31, 2008, appellant filed a Motion for Continuance of the jury trial "due to reason of the short notice of the scheduling," because defense counsel had a scheduled review hearing in Juvenile Court and a doctor's appointment on such date and also because defense counsel had a prepaid seminar on August 8, 2008. The trial court overruled such motion pursuant to an Order filed on August 6, 2008.

{¶6} Appellee State of Ohio filed a Motion to Amend the Indictment on August 6, 2008. Appellee, in its motion, alleged, in relevant part, as follows:

{¶7} "The State respectfully asks this Court to amend the indictment in this matter pursuant to Ohio Crim. R. 7(D). Further investigation has revealed that the crime charged in Count II occurred in a timeframe that is slightly earlier than the time found in the original indictment. The crime charged in Count II actually occurred between on or about April 1, 2007 and on or about August 16, 2007. The original indictment alleged a starting date of 'July.' In other words, the original indictment does not begin the alleged timeframe as soon as it should."

{¶8} Thereafter, a jury trial commenced on August 7, 2008. Prior to testimony being taken, the trial court granted appellee's motion to amend the indictment. The following testimony was then adduced at trial.

{¶9} Dan Gerhardt testified at trial that he did not recognize appellant and had never seen her. He further testified that he was appointed by the Richland County Juvenile Court on April 23, 2007 to represent a young man named Wesley Miller in relation to a criminal case. Miller, who was fifteen years old at the time, is appellant's son and had been charged with a misdemeanor theft offense of stealing a bottle of Vodka and also with a second degree felony burglary charge. According to Gerhardt, the State's case against Miller was overwhelming, and he thought that it would be in Miller's best interest to admit guilt and not proceed to trial.

{¶10} Gerhardt testified that Miller was living with his paternal grandmother, Shelvia Miller, and that he had drug and alcohol problems. When asked what Miller was

like when he met with him and his grandmother, Gerhardt testified that Miller was cooperative and compliant and was "straightforward." Transcript at 152.

{¶11} Gerhardt testified that, shortly after he was appointed to represent Miller, he was told by Miller's grandmother that Miller was with appellant in Texas. Gerhardt testified that he called appellant in Texas on April 30, 2007 to arrange for Miller to be brought back to Ohio for a hearing on May 2, 2007. The following testimony was adduced when Gerhardt was asked what appellant said to him over the phone:

{¶12} "A. When she learned I was a court appointed attorney, she indicated to me that she wanted to hire her own attorney. She was going to get somebody different to represent him. She became - - her attitude was condescending over the phone to me when she learned I was court appointed. I got the feeling that she thought I wasn't going to do much good for him because I was court appointed. She was curt, and indicated to me in no uncertain terms that she wasn't going to bring this young man back, and she wanted a continuance. Meaning that she wanted to have the case scheduled for a later date. I told her that I could not get the case continued, and she needed to make arrangements to get him back here in time for that case on 5/2/07." Transcript at 155.

{¶13} Gerhardt testified that he told appellant that he could not get a continuance and that Miller needed to be back, but that appellant "said she wasn't bringing him back." Transcript at 156. He further testified that he did not believe that a continuance was in Miller's best interest and that requesting a continuance might risk making the court angry.

{¶14} Shortly thereafter, Gerhardt learned that appellant had filed a pro se motion for a continuance of the May 2, 2007, hearing and that the same had been granted. He identified State's Exhibit 3, which was a June 19, 2007, Judgment Entry from Miller's Juvenile case indicating that Miller was required to appear at a pretrial conference on August 7, 2007. A copy of the Judgment Entry was sent by the juvenile court via certified mail to appellant in Texas and also to Miller's grandmother, Shelvia Miller. Gerhardt testified that when he attempted to notify appellant on July 11, 2008 by phone of the hearing date, he was informed by the operator that the customer had voluntarily had their number shut off.

{¶15} Gerhardt testified that the next day, on July 12, 2008, he wrote a letter to appellant advising her that Miller needed to be in the Richland County Juvenile Court on August 7, 2008 at 9:30 a.m. and that it was important to be there on time. He also sent her copies of the notice setting the hearing. A copy of the letter was admitted as State's Exhibit 4. Miller never appeared on August 7, 2008. Gerhardt further testified that he saw Miller again in September of 2007 when he learned that Miller was in the Richland County Juvenile Detention Center and that Miller admitted to the burglary charge. Gerhardt continued representing Miller through the end of his case.

{¶16} Wesley Miller testified at his mother's trial that he was living with his paternal grandmother at the time he committed the burglary. He testified that he did not want Dan Gerhardt to represent him because of "prior incidents" and that he called appellant in Texas and "she told me the facts and stuff, and I didn't want him as my attorney, so I went down to Texas." Transcript at 203. Miller testified that appellant

bought the bus tickets for him to go to Texas. The following is an excerpt from Miller's testimony:

{¶17} "Q. And can you tell us again why did your mom and you decide that you should go to Texas?

{¶18} "A. Because Dan Gerhardt was a conflict of interest.

{¶19} "Q. What do you mean by that?

{¶20} "A. I guess prior incidents, he wasn't even supposed to represent me.

{¶21} "Q. So basically you went down to Texas because you and your mom had decided you wanted a new attorney?

{¶22} "MS. MAYER: Objection, leading.

{¶23} "THE COURT: Overruled.

{¶24} "Q. You can answer.

{¶25} "A. We went down there to get a new lawyer because he was conflict of interest." Transcript at 204-205.

{¶26} Miller further testified that he stayed with appellant for months and that he refused to return to Ohio, even though appellant wanted him to. He testified that when appellant called the police on him, she was arrested on an outstanding warrant and that a few days later, he was arrested and later extradited to Ohio. On cross-examination, Miller testified that he asked Gerhardt if he knew Miller's parents and that Gerhardt "told me he didn't know either and I knew he was lying." Transcript at 208. According to Miller, "my dad told me that he did know him from a prior incident at Children's Services." Transcript at 208. Miller further testified that he did not tell his paternal grandmother that he was going to Texas because he was afraid that she would stop

him. He further testified that his mother had purchased tickets in July for him to return to Ohio for his August 7, 2008, court date.

{¶27} At trial, Miller testified that after he was extradited to Ohio, he spoke with a man named Dave Miller at the Richland County Juvenile Court and told Dave Miller that he left Ohio because his attorney, Dan Gerhardt, had a conflict of interest and was "a bad attorney for me because he had a prior incident with my mother and father." Transcript at 216. On redirect, when confronted with Exhibit C, which was a summary of his statement to Dave Miller, Miller admitted that he never told Dave Miller that his mother had bought him tickets to return to Ohio. Miller further testified that his mother never took him to the bus station in August of 2007 and that, when he refused to return to Ohio, his mother never called police and told them where Miller was located.

{¶28} At trial, Miller's paternal grandmother, Shelvia Miller, testified that she had lived with Miller off and on since his birth and that he was living with her in the fall of 2006. She testified that she went to court with Miller after he got into trouble and that, after he disappeared, she learned that he was in Texas. Shelvia Miller testified that she then called Dan Gerhardt and told him that Miller was in Texas. According to Shelvia Miller, when she spoke with appellant, appellant told her that she did not want Gerhardt to be Miller's attorney and that she was going to get him another attorney.

{¶29} After appellant's Crim.R. 29 Motion was overruled, appellant testified that she met Dan Gerhardt in 1996 when she had a Children's Services case pending and that he did not represent her properly in such case. She testified that she fired him in 1998 and then filed a disciplinary complaint against him. Appellant testified that Miller told her that he was facing one to five years in prison and that "when I found out that he

had Dan Gerhardt for an attorney, I flipped." Transcript at 249. The following is an excerpt from appellant's trial testimony:

{¶30} "I told him absolutely not. I hung up, I called Dan Gerhardt and I told him he needed to step down. He refused. Him and I got into a screaming match on the phone and I told him I was going to have Wesley's case continued, that I was taking him down to Texas and that I would take care of it, that he was not going to represent my son because of the conflict him and I had before. I was not going to take the chance of my son going to prison when he needed help." Transcript at 249-250.

{¶31} Appellant testified that after the above phone conversation, she called Miller and told him that she was going to get him bus tickets to Texas and that she was going to get him an attorney so that he could get the help that he needed. She testified that she filed a motion in the Juvenile Court for a continuance of the May 2nd hearing based on the conflict of interest with Dan Gerhardt and that the same was granted. She further testified that, in her memorandum to the Juvenile Court in Miller's juvenile case, she indicated that she had told Shelvia Miller that appellant would be attending Job Corp in Texas because he was not attending school. Appellant also testified that she did not hire another attorney for Miller because of financial problems.

{¶32} At trial, appellant testified that she bought open-ended bus tickets on July 7, 2007, so that she and Miller could come back to Ohio for the August 7, 2007, hearing. According to Appellant, the two were supposed to leave on July 15, 2007. Appellant testified that Miller, who could not get into Job Corp because of his pending case, refused to return to Ohio. She also testified that she did not want her son, who has drug and alcohol problems, to go to prison and that it was never her intent to avoid having

Miller face the charges against him. She testified that she called the police in Texas in August of 2007 and that they arrested her on a warrant for bad checks. According to appellant, two days later, the police in Texas arrested Miller after he robbed a place. When asked why she arranged for Miller to go to Texas, appellant testified that she "wanted to straighten him out." Transcript at 266.

{¶33} On cross-examination, appellant testified that she was convicted in March of 2008 for issuing a worthless check. She further testified that she did not call Shelvia Miller when she arranged for Miller to go down to Texas because Shelvia Miller was going to let Dan Gerhardt represent Miller. Appellant admitted purchasing the bus tickets for Miller in April of 2007 to go down to Texas and that Miller lived with her the summer of 2007. Appellant admitted that she knew in March of 2007, that Miller had committed a burglary and that burglary was a serious crime and that she knew that Miller was supposed to appear in court on May 2, 2007, on the burglary charge. When questioned about the motion for continuance she filed in the Juvenile Court, appellant admitted on cross-examination that she faxed the same to the court after Miller was already on his way down to Texas.

{¶34} During cross-examination, appellant also admitted that when she took Miller away from Ohio in the middle of his burglary trial, she was planning on signing him up for the Job Corp program, which lasted all year. Appellant further testified that Dan Gerhardt lied when he testified at the jury trial in this case that he did not remember her. Appellant testified that she needed Miller to get to Texas because his paternal grandmother had lost control of him and because she was not going to leave his life in Dan Gerhardt's hands. Appellant admitted that when Miller allegedly refused to return to

Ohio for his August 7, 2007, court date, she did not contact the Juvenile Court to say that he would not be coming back to Ohio. On subsequent recross-examination, appellant testified that she knew about Miller's burglary case since March of 2007, that she had received paralegal training to take over her own case, and that she then took Miller to Texas in the middle of the burglary case.

{¶35} At the end conclusion of the evidence and the end of deliberations, the jury, on August 11, 2008, found appellant guilty of both counts. The jury further found that the State had proved that the crime committed by Wesley Miller, if committed by an adult, would be burglary, a felony of the second degree. As memorialized in an Entry filed the same day, appellant was sentenced to eleven (11) months in prison.

{¶36} Appellant now raises the following assignments of error on appeal:

{¶37} "I. TRIAL COURT ERRED TO DEFENDANT/APPELLANT'S PREJUDICE BY REFUSING TO GRANT HER A CONTINUANCE.

{¶38} "II. TRIAL COURT ERRED TO DEFENDANT/APPELLANT'S PREJUDICE BY EXCLUDING HER EXHIBIT G.

{¶39} "III. THE TRIAL COURT ERRED TO DEFENDANT'S PREJUDICE BY ALLOWING THE STATE TO AMEND THE INDICTMENT THE DAY BEFORE TRIAL.

{¶40} "IV. THE VERDICT WAS CONTRARY TO THE WEIGHT OF THE EVIDENCE."

I

{¶41} Appellant, in her first assignment of error, argues that the trial court erred in overruling her request for a continuance of the trial. We disagree.

{¶42} The grant or denial of a continuance is a matter entrusted to the broad, sound discretion of the trial court. *State v. Hoff,* Fairfield App. No. 02-CA-89, 2003-Ohio-3858, at ¶ 15, citing *State v. Unger* (1981), 67 Ohio St.2d 65, 423 N.E.2d 1078. In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. In determining whether a trial court abused its discretion in denying a motion for a continuance, an appellate court should consider the following factors: (1) the length of the delay requested; (2) whether other continuances had been requested and received; (3) the inconveniences to witnesses, opposing counsel and the court; (4) whether there was a legitimate reason for the continuance; (5) whether the defendant contributed to the circumstances giving rise to the need for the continuance; and other relevant factors, depending on the unique facts of each case. *Unger* at 67-68, 423 N.E.2d 1078; *State v. Holmes* (1987), 36 Ohio App.3d 44, 47-48, 521 N.E.2d 479.

{¶43} As is stated above, a jury trial was originally scheduled for June 5, 2008. After appellant, on May 30, 2008, filed a Motion for Continuance of the June 5, 2008, trial because additional discovery had been requested and her attorney was scheduled for a jury trial in another court, the jury trial was continued to June 19, 2008. Upon the State’s motion, the jury trial was later rescheduled to July 24, 2008. Subsequently, as memorialized in an Order filed on July 25, 2008, the jury trial was rescheduled to August 7, 2008, because the trial court was involved in another trial.

{¶44} After appellant, on July 31, 2008, filed a Motion for Continuance of the jury trial because of short notice of the new trial date, because defense counsel had a

scheduled review hearing in Juvenile Court and a doctor's appointment on August 7, 2007, and also had a prepaid seminar on August 8, 2008, the trial court overruled such motion pursuant to an Order filed on August 6, 2008. Appellant, on August 6, 2008, then filed an "Objection to Order Overruling a Continuance and Request for Reconsideration." Appellant, in such motion, noted that contrary to the trial court's statement in its August 6, 2008, Order, the case had previously been continued only once, rather than twice, at appellant's request. Appellant also noted that contrary to the trial court's statement in its August 6, 2008 order, the case was not continued because defense counsel had a vacation.

{¶45} Appellant now argues that the trial court should have granted a continuance based on the amendment of the indictment on the day of the trial. However, appellant never requested a continuance on such basis. Rather, prior to the start of trial on August 7, 2008, and after appellee's motion to amend was granted, appellant's counsel stated on the record as follows when asked whether there was anything else the court and attorneys needed to talk about: "I requested a re-consideration of the continuance. I understand it was overruled. I didn't receive anything in writing. I want to make sure it was part of the record that it was overruled." Transcript at 8.

{¶46} Based on the foregoing, and the fact that the trial had already been continued three times, once at appellant's request, we find that the trial court did not abuse its discretion in overruling the request for a continuance.

{¶47} Appellant's first assignment of error is, therefore, overruled.

II

{¶48} Appellant, in her second assignment of error, argues that the trial court erred by excluding appellant's Exhibit G. We disagree.

{¶49} Evid. R. 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The admission or exclusion of evidence lies in the trial court's sound discretion. *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶50} At the trial in his matter, appellant sought to admit Exhibit G, which was a April 30, 1997, Judgment Entry from a dependency case in Juvenile Court stating that Richland County Children's Services had custody of Wesley Miller and ordering appellant and Wesley Miller's father to pay child support. After appellant sought to admit such exhibit, appellee objected, arguing that the same was not relevant. The following discussion took place when defense counsel was asked about the relevance of Exhibit G:

{¶51} "MS. MAYER: Because he [the Prosecution] was challenging her credibility regarding Attorney Gerhardt's representation. And that, at least she made an attempt to - - actually I can take the second page, that was just the confirmation of the fact he's a juvenile. They have been trying to find her original file so we could have

evidence that Attorney Gerhardt was the attorney of record. This came close to help her credibility." Transcript at 299.

{¶52} The trial court then sustained appellee's objection, finding that Exhibit G did not show that appellant had any attorney at all.

{¶53} Because defense counsel admitted that Exhibit G did not indicate that Dan Gerhardt, or any other attorney for that matter, had represented appellant or was involved in the juvenile dependency case involving Wesley Miller, we concur with appellee that the same was not relevant. Exhibit G did not have any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

{¶54} Appellant's second assignment of error is, therefore, overruled.

III

{¶55} Appellant, in her third assignment of error, argues that her conviction was against the manifest weight of the evidence. We disagree.

{¶56} On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and 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 judgment must be reversed. The discretionary power to grant a new hearing should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N .E.2d 541 superseded by constitutional amendment on other grounds as stated by *State v. Smith,* 80 Ohio St.3d 89, 1997-Ohio-355, 684 N.E.2d 668, citing *State v. Martin* (1983), 20

Ohio App.3d 172, 175, 485 N.E.2d 717. Because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, syllabus 1.

{¶57} In the case sub judice, appellant was convicted of one count of obstructing justice in violation of R.C. 2921.32(A)(1) and one count of obstructing justice in violation of R.C. 2921.32(A)(2). R.C. 2921.32 states, in relevant part, as follows: "A) No person, with purpose to hinder the discovery, apprehension, prosecution, conviction, or punishment of another for crime or to assist another to benefit from the commission of a crime, and no person, with purpose to hinder the discovery, apprehension, prosecution, adjudication as a delinquent child, or disposition of a child for an act that if committed by an adult would be a crime or to assist a child to benefit from the commission of an act that if committed by an adult would be a crime, shall do any of the following:

{¶58} "(1) Harbor or conceal the other person or child;

{¶59} "(2) Provide the other person or child with money, transportation, a weapon, a disguise, or other means of avoiding discovery or apprehension..."

{¶60} Based on the facts as set forth in detail above, we cannot say that the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed. At the trial in this matter, testimony was adduced that appellant purchased a bus ticket for her son to travel to Texas knowing that he had been charged with burglary in Richland County Juvenile Court and that the charges were pending against him. Appellant specifically admitted that she took Wesley Miller, her son, down to Texas in the middle of his burglary case. Moreover, testimony was

adduced that appellant failed to ensure that her son return to Ohio for the August 7, 2007, date and did not advise the Juvenile Court when he allegedly refused to return to Ohio. While appellant notes that Wesley Miller, her son, testified at trial that appellant tried to get him to return to Ohio and that he refused to do so, the jury, as trier of fact, was in the best position to assess his credibility. The jury clearly did not find him to be credible.

{¶61} Appellant's third assignment of error is, therefore, overruled.

IV

{¶62} Appellant, in his fourth assignment of error, argues that the trial court erred by allowing appellee to amend the indictment the day before trial. We disagree.

{¶63} Crim.R. 7(D) states: "The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged ..." Although the rule permits most amendments, it flatly prohibits amendments that change the name or identity of the crime charged. See *State v. O'Brien* (1987), 30 Ohio St.3d 122, 126, 508 N.E.2d 144. A trial court commits reversible error when it permits an amendment that changes the name or identity of the offense charged, regardless of whether the defendant suffered prejudice. *State v. Smith,* Franklin App. No. 03AP-1157, 2004-Ohio-4786, at paragraph 10. See, also, *State v. Headley,* 6 Ohio St.3d 475, 453 N.E.2d 716. "Whether an amendment changes the name or identity of the crime charged is a matter of law." *State v. Cooper* (June 25, 1998), Ross App. No.

97CA2326, 1998 WL 340700, at 1, citing *State v. Jackson* (1992), 78 Ohio App.3d 479, 605 N.E.2d 426.

{¶64} The Supreme Court of Ohio has indicated an amendment that changes neither the degree nor the severity of an offense does not change the identity of the offense. See *State v. O'Brien* (1987), 30 Ohio St.3d 122, 126-127, 508 N.E.2d 144.

{¶65} In the case sub judice, the original indictment alleged in Count II as follows:

{¶66} "COUNT II: CATHERINE M. SWITZER, DOB: 12/12/1963, between on or about the 1st day of July, 2007 and the 16th day of August, 2007, at the County of Richland, with purpose to hinder the discovery, apprehension, prosecution, adjudication as a delinquent child or disposition of a child, for an act that if committed by an adult would be a crime, did provide the child with money, transportation, a weapon, a disguise, or other means of avoiding discovery or apprehension, and the crime committed by the child aided is a felony, in violation of section 2921.32(A)(2) of the Ohio Revised Code, felony of the fifth degree."

{¶67} On August 6, 2008, appellee filed a Motion to Amend Count II of the indictment, alleging in its motion that additional investigation had revealed that the offense charged in such count, which was the provision of transportation via bus to Texas, "actually occurred between on or about April 1, 2007 and on or about August 16, 2007." Prior to the start of trial on August 7, 2008, the trial court granted such motion, stating, in relevant part, as follows: "What I hear them saying is that they are making the same allegations, but that they found out that the transport [by bus] happened earlier than they thought." Transcript at 7-8.

{¶68} Appellant, in his brief, relies on this Court's decision in *State v. Plaster,* 164 Ohio App.3d 750, 2005-Ohio-6770, 843 N.E.2d 1261. In such case, on May 6, 2004, the Richland County Grand Jury indicted the appellant on one count of illegal conveyance of a prohibited item into a detention facility and one count of bribery. The indictment set forth the date of the offenses as "on or about the 22nd day of March, 2004." Three days before trial, the state filed a motion to amend the indictment, requesting that the indictment dates be amended from "on or about the 22nd day of March, 2004," to "between February 1, 2004, and March 31, 2004." After the appellant filed a brief in opposition to the motion to amend the indictment, asserting that the state was required to resubmit the matter to the grand jury, the trial court allowed the state to amend the indictment.

{¶69} In holding that the trial court had erred in permitting the amendment, this Court held, in relevant part, as follows: "The indictment identified the date of March 22, 2004. That date corresponds to the incident in which Spencer had been fitted with a recording device but the drug/money exchange was inadvertently aborted. The indictment, as amended, effectively added two additional offenses: the February 25, 2004 drug exchange at Dairymart and the drug transfer later that day while Spencer's car was at work. Though these two instances would result in the same 'name' of crime charged in the indictment (illegal conveyance of a prohibited item into a detention facility), the fact that they are separate crimes from that charged in the original indictment changes the identity of the crime charged in the indictment. The jury thus heard evidence of three separate incidents, on any one of which it could have convicted. Because appellant could have independently been convicted on the evidence

of either of these other two incidents and not on the indicted March 22 incident, we find that the trial court erred in allowing the state to amend the indictment." Id at paragraph 44.

{¶70} Appellant also relies on *State v. Vitale* (1994), 96 Ohio App.3d 695, 645 N.E.2d 1277. In *Vitale*, the defendant had been charged with committing a theft offense on June 14, 1991. The defendant had picked his car up from a repair shop on June 14, 1991, without paying for the repairs because an insurance company was to pay for the same. However, after receiving payment from the insurance company, the defendant did not pass it along to the repair shop. On June 21, 1991, the defendant returned his vehicle to the house of the man who owned and operated the repair shop with complaints about the work the shop had done. That same day, however, the defendant returned to the shop and took back his vehicle. On those facts, and at the conclusion of the State's case, the indictment was amended to reflect that the theft occurred "June 14, 1991 through June 21, 1991, inclusive." *Vitale*, 96 Ohio App.3d at 698, 645 N.E.2d 1277. The court, in *Vitale,* held that the amendment had changed the identity of the crime, because the indictment was amended to add a separate crime which occurred at a different time and place. Id. at 700-01. As noted by the court in *State v. Shafer*, Cuyahoga App. No. 79758, 2002-Ohio-6632, the State in *Vitale*, had sought to amend the indictment "to include a <u>different</u> potential theft occurring at a different address, over an expanded period of time." Id at ¶ 16. (Emphasis added).

{¶71} In contrast, the amendment to the indictment in the case sub judice did not add a separate crime or crimes occurring at a different time and place or change the name or identity of the offense. The only incident at issue in Count II of the indictment

was the incident during which appellant provided Wesley Miller with a bus ticket to Texas. The indictment was amended only when it was discovered that Wesley Miller travelled by bus to Texas in April, which was earlier than originally thought. Moreover, we note that appellant never asked for a continuance of the trial based on the amendment of the indictment. We find, therefore, that the trial court did not err in allowing appellee to amend Count II of the indictment.

{¶72} Appellant's fourth assignment of error is, therefore, overruled.

{¶73} Accordingly, the judgment of the Richland County Court of Common Pleas is affirmed.

By: Edwards, J.

Gwin, P.J. and

Farmer, J. concur

_____

_____

_____

JUDGES

JAE/1222

[Cite as *State v. Switzer*, 2009-Ohio-2666.]

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
CATHERINE SWITZER	:	
Defendant-Appellant	:	CASE NO. 2008 CA 0069

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Richland County Court of Common Pleas is affirmed. Costs assessed to appellant.

_____

_____

_____

JUDGES