[Cite as *State v. Newton,* 2009-Ohio-4469.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

FLINTON W. NEWTON

Defendant-Appellant

JUDGES:
Hon. Sheila G. Farmer, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 09 CAA 02 0015

O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 08 CRI 050282
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	August 31, 2009

APPEARANCES:

For Plaintiff-Appellee

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Wise, J.

{¶1} Appellant Flinton W. Newton appeals his conviction, in the Delaware County Court of Common Pleas, for receiving stolen property. The relevant facts leading to this appeal are as follows.

{¶2} In early 2008, Chris Taylor, a Columbus-based contractor who worked from a home office, began considering changing his telephone and internet service. Taylor contacted "Insight," an internet and cable provider, and spoke with appellant, who worked as a sales representative for said company. Appellant and Taylor made arrangements for an installer to set up the necessary equipment and wiring, which took place on April 4, 2008. Appellant called Taylor that afternoon to arrange pick-up of Taylor's check for payment.

{¶3} Early that evening, appellant arrived at Taylor's residence/office, where Taylor was working on some invoices. Taylor invited appellant inside and wrote the payment check, which was serial number 1121 in Taylor's book of personal checks. The two men engaged in small talk for a few minutes, and at one point Taylor left the room for a brief period to use the bathroom and get a beverage. Newton left the premises shortly after Taylor returned.

{¶4} On May 10, 2008, appellant was stopped by a Westerville police officer, David Leighty, for a traffic violation. The officer discovered that appellant was wanted on a warrant in the State of Georgia. Appellant was arrested, and his vehicle was impounded and searched. At that time, one of Taylor's blank checks, serial number 1122, was found in the console. Another blank check was found, with the heading "F.W. Newton and Sons Asphalt, Inc., Alpharetta, Georgia."

{¶5} At his bank's behest, Taylor thereupon contacted the police and found out they had recovered one of his blank checks. Taylor at that point did not realize a check was missing; however, he denied giving appellant a blank check or permitting him to take one.

{¶6} On May 20, 2008, appellant was indicted on one count of receiving stolen property, R.C. 2913.51(A), a felony of the fifth degree, and one count of having a weapon under a disability, R.C. 2923.13(A)(1), a felony of the third degree. The matter thereafter proceeded to a jury trial. The jury, which posed several questions to the trial court judge during deliberations, at one point receiving a deadlock instruction pursuant to *State v. Howard* (1989), 42 Ohio St.3d 18, ultimately found appellant guilty of receiving stolen property. The weapon under disability charge was dismissed.

{¶7} On January 20, 2009, the trial court sentenced appellant to two years of community control, with intensive supervision. The terms of community control included, inter alia, $540.00 in restitution, thirty days in jail, and 100 hours of community service.

{¶8} On February 13, 2009, appellant filed a notice of appeal. He herein raises the following three Assignments of Error:

{¶9} "I. NEWTON WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 10 AND 16, ARTICLE ONE OF THE OHIO CONSTITUTION BECAUSE THE TRIAL COURT MISLED THE JURY BY INSTRUCTING THEM THAT THE THEFT OFFENSE UNDERLYING THE CHARGE OF RECEIVING STOLEN PROPERTY COULD OCCUR OVER A PERIOD OF TIME IN CONTRAVENTION OF R.C. 2913.51(A), WHICH

REQUIRES THAT THE THEFT OFFENSE OCCUR WHEN THE PROPERTY IS INITIALLY 'OBTAINED,' NOT OVER SOME SUBSEQUENT PERIOD OF TIME.

{¶10} "II. NEWTON WAS DEPRIVED OF HIS RIGHT TO COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION BECAUSE HIS TRIAL ATTORNEY PERFORMED DEFICIENTLY BY FAILING TO OBJECT TO THE MISLEADING SUPPLEMENTAL JURY INSTRUCTION THAT THEFT CAN OCCUR OVER A PERIOD OF TIME.

{¶11} "III. THE GUILTY VERDICT ON RECEIVING STOLEN PROPERTY IN VIOLATION OF R. C. 2913.51(A) WAS NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE."

I.

{¶12} In his First Assignment of Error, appellant contends he was denied his rights to due process and a fair trial by the trial court's instructions to the jury concerning the charge of receiving stolen property. We disagree.

{¶13} Appellant herein concedes his defense counsel did not object to the pertinent jury instructions as to the charge of receiving stolen property as required by Crim.R. 30(A). However, under Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." In *State v. Cooperrider* (1983), 4 Ohio St.3d 226, 448 N.E.2d 452, the Ohio Supreme Court discussed the application of the plain error doctrine in the context of an allegedly erroneous jury instruction. The Court stated: " * * * [A]n erroneous jury instruction 'does not constitute a plain error or defect under Crim.R. 52(B) unless, but

for the error, the outcome of the trial clearly would have been otherwise.' *State v. Long* (1978), 53 Ohio St.2d 91, 97, 372 N.E.2d 804. Additionally, the plain error rule is to be applied with utmost caution and invoked only under exceptional circumstances, in order to prevent a manifest miscarriage of justice." Id. at 227, 372 N.E.2d 804.

{¶14} R.C. 2913.51(A) states as follows: "No 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."

{¶15} In the case sub judice, the trial court gave jury instructions at the close of evidence on December 9, 2008, and the jury retired to deliberate at 1:42 PM on that day. At about 3:00 PM, the court addressed a question from the jury, as follows:

{¶16} THE COURT: We've received another question from the jury. Counsel are all present as well as the defendant. The question is, 'is it our job to determine if the check is stolen?' In conversation with counsel, they agree to refer the jury to page 8 of the instructions and say, the jury must determine whether the defendant knew or had reasonable cause to believe the check was obtained through the commission of a theft offense. That, basically, answers the question. Are you in agreement?" Tr. at 101.

{¶17} At about 3:30 PM, the court addressed two more questions from the jury, as follows:

{¶18} "THE COURT: We have two questions. The first one is, does a theft offense required (sic) purpose. The answer to that would be, yes.

{¶19} "The second question is, does a theft offense occur only in an instance or over a period of time. And the answer to that would be, 'yes, it can occur in an instance or over a period of time.' Are you all right with that?" Tr. at 102.

{¶20} Appellant argues that the aforesaid instructions are "highly misleading" to a jury where the accused is charged with receiving stolen property. Appellant's Brief at 4. In essence, appellant maintains that the General Assembly did not intend that R.C. 2913.51(A) would apply to cases where a defendant's unlawful purpose to deprive the owner developed after possession was initially obtained. Appellant's Brief at 5. In other words, appellant urges the jury instructions should be clearer that the State must show that a defendant knew or reasonably should have known, at the very time of his obtaining, that the property had been stolen.

{¶21} Appellant's arguments might carry more weight if the record gave more credence to the theory that appellant first obtained the blank check from Taylor on April 4, 2008 by accident or misunderstanding. However, on cross-examination, Taylor was asked if there indeed was nothing else in his hand when he gave appellant check #1121. Taylor testified "absolutely correct." Tr. at 31. Taylor was then asked if he was positive that only one check had been handed to appellant. Taylor responded: "I've written thousands of checks and I've never done that before in my life, handed two checks." Tr. at 31-32. Furthermore, the record is clear that Taylor left the room briefly to use the bathroom and get a beverage, creating a possible opportunity for appellant to take the next blank check in the book, #1122. Finally, when police found the blank check, appellant had yet to return it after five weeks, and another blank check (from a family business in Georgia) was also discovered in the vehicle.

{¶22} Thus, upon review, we find that appellant has failed to demonstrate that the outcome of the trial clearly would have been otherwise, but for the alleged jury instruction error. As such, appellant's plain error argument must fail.

{¶23} Appellant's First Assignment of Error is therefore overruled.

II.

{¶24} In his Second Assignment of Error, appellant argues he was deprived of the effective assistance of trial counsel. We disagree.

{¶25} Our standard of review is set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Ohio adopted this standard in the case of *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. These cases require a two-pronged analysis in reviewing a claim for ineffective assistance of counsel. First, we must determine whether counsel's assistance was ineffective; whether counsel's performance fell below an objective standard of reasonable representation and was violative of any of his essential duties to the client. If we find ineffective assistance of counsel, we must then determine whether or not the defense was actually prejudiced by counsel's ineffectiveness such that the reliability of the outcome of the trial is suspect. This requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the trial would have been different. *Id.* Trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie* (1998), 81 Ohio St.3d 673, 675, 693 N.E.2d 267.

{¶26} Appellant's argument is similar to that in his first assigned error, except that he contends his trial counsel was ineffective for not objecting to the jury instructions and responses to the jury’s questions during their deliberations. However, in light of our previous analysis, we are unpersuaded that the outcome of the trial would have been different had the proposed objections been raised by trial counsel. We therefore find

appellant was not prejudiced thereby and was not deprived of the effective assistance of trial counsel.

{¶27} Appellant's Second Assignment of Error is therefore overruled.

III.

{¶28} In his Third Assignment of Error, appellant contends his conviction for receiving stolen property is against the manifest weight of the evidence. We disagree.

{¶29} Our standard of review on a manifest weight challenge to a criminal conviction is stated as follows: "The court, 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. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. See also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175, 485 N.E.2d 717. Furthermore, where a disputed element of the offense charged is, by its nature, not susceptible of proof by direct evidence, circumstantial evidence may be used to provide an inference of guilt. *State v. Reed*, Franklin App.No. 08AP-20, 2008-Ohio-6082, ¶ 44, citing *State v. Caldwell* (Nov. 16, 2000), Franklin App. No. 99AP1107, citing *State v. Alexander* (June 17, 1987), Hamilton App. No. C-860530.

{¶30} In the case sub judice, appellant maintains that the evidence demonstrates he held the blank check without attempting to falsely negotiate or otherwise convert it. He also notes the jury at one point announced it was deadlocked,

and only resumed deliberations after a *Howard* instruction. Nonetheless, based on the testimony of Taylor and Officer Leighty, and upon review of the remaining record in this case,[1] we find the jury did not clearly lose its way and create a manifest miscarriage of justice requiring that appellant's conviction be reversed and a new trial ordered.

{¶31} Appellant's Third Assignment of Error is therefore overruled.

{¶32} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Delaware County, Ohio, is hereby affirmed.

By: Wise, J.

Farmer, P. J., and

Delaney, J., concur.

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JUDGES

JWW/d 811

[1] There were two brief defense witnesses: Uriel Campos, an Insight sales manager, and the victim, Chris Taylor, called for additional cross-examination.

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
FLINTON W. NEWTON	:	
Defendant-Appellant	:	Case No. 09 CAA 02 0015

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio, is affirmed.

Costs to be assessed to appellant.

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JUDGES