[Cite as *State v. Riggs*, 2010-Ohio-5697.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2010 CA 20
TERESA RIGGS	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Court of Common Pleas Case No. 08 CR 369
JUDGMENT:	AFFIRMED IN PART; SENTENCE VACATED IN PART AND CAUSE REMANDED
DATE OF JUDGMENT ENTRY:	November 18, 2010

APPEARANCES:

For Plaintiff-Appellee:

MARITSA A. FLAHERTY 0080903
Licking County Assistant Prosecuting Attorney
20 S. Second Street, 4th Floor
Newark, Ohio 43055

For Defendant-Appellant:

SCOTT D. SCHOCKING 0062949
5073 Bixby Road
Groveport, Ohio 43215

Delaney, J.

{¶1} Theresa Gail Riggs ("appellant") seeks to overturn her conviction and sentence for one count of misuse of credit cards in violation of R.C. 2913.21, a fifth degree felony.

STATEMENT OF FACTS AND CASE

{¶1} On June 2, 2008, the Licking County Grand Jury indicted appellant on one count of misuse of credit cards (over $5,000.00) in violation of R.C. 2913.21(B)(2), a felony of the fourth degree, and one count of theft of credit cards in violation of R.C. 2913.02(A)(1) and/or (2), a felony of the fifth degree. At her arraignment on June 16, 2008, appellant entered a plea of not guilty to the charges.

{¶2} Subsequently, a jury trial commenced on February 19, 2008. The following testimony was adduced at trial.

{¶3} Daniel A. Neel, Jr. testified that he was employed at Ross's Granville Market and that he met appellant when he was a statistician for the Granville football team while appellant was photographing the games. According to Neel, in late 2007, appellant was shopping at the Granville Market when appellant came up to him and gave him her telephone number. Neel testified that the two went out a couple of times and that he went over to her house three or four times for dinner.

{¶4} During the middle of January of 2008, Neel was hospitalized for leukemia. He was in the hospital for a total of 27 days at that time and, upon release, stayed at appellant's house for four (4) days before he was readmitted to the hospital for another 27 days. Neel then went to stay with appellant again so that she could help him. Neel

testified that at one point when he was in the hospital, he and appellant had talked about maybe living together.

{¶5} Testimony was adduced at trial that before Neel entered the hospital in mid-January of 2008 for the first time, he asked appellant if she could take care of his apartment and his cat and that he gave her a key to his apartment. When asked, Neel testified that no one else had a key. Neel testified that appellant was supposed to pick up his mail and take it to his brother, who had a power of attorney, and to check his telephone messages. Neel testified that he never made arrangements to pay appellant for these services because she was helping him out as a friend. He further testified that he never made an agreement with appellant to pay any of her bills. He testified that their relationship was platonic.

{¶6} At trial, Neel testified that before he left for the hospital the first time in mid-January, he hid his credit cards underneath t-shirts in a chest of drawers in his apartment. He testified that he did not see the cards again until the end of March or mid-April of 2008. The second time that appellant was released from the hospital, he went and stayed with appellant again for between a week and ten (10) days until she asked him to leave immediately for allegedly saying something inappropriate to her daughter. Neel testified that the day he was asked to leave was the same day that he found out that he was in remission. Neel then went and stayed with a cousin.

{¶7} When Neel eventually moved back into his apartment, he started receiving credit card bills containing charges for purchases that he had not made. After he was unable to locate the credit cards, Neel called appellant, who told him that the cards were in a manila envelope by a reclining chair in his apartment. Neel found the four cards in

the envelope that appellant mentioned. Neel then filed a police report. When asked, Neel testified that he never gave permission to appellant to take any of the four credit cards and that he never gave permission to appellant or anyone else to use the same. Neel further testified that the charges were made while he was in the hospital.[1]

{¶8} Neel testified that he never agreed to pay appellant's daily expenses or rent while he was staying with her, but that he did pay her rent twice when she said that she could not afford to do so. Neel testified that his brother, who was his power of attorney, wrote a check for the rent and that appellant went and picked it up. According to Neel, "[t]he understanding was that she would pay me back whenever she had- - was able to." T. at 83. Neel also testified that, early January of 2008, he paid a utility bill for appellant before he went into the hospital because he did not want appellant and her daughter to have the utilities cut off.

{¶9} On cross-examination, Neel testified that, after he was released from the hospital, appellant changed his dressings and made sure that he took his medications at the right times.

{¶10} At the trial, Richard McCoy, the manager for Agland Co-op, testified that appellant placed a $216.03 order for heating oil on January 25, 2008, using a credit card. McCoy testified that appellant told him that the credit card belonged to her mother and that she used appellant's billing address, stating that it was her mother's.

{¶11} After her Crim.R. 29 motion for judgment of acquittal was denied, appellant testified in her own defense. Appellant testified that she and Neel had been involved in a romantic relationship since late October early November of 2007, and that they saw each other frequently until the relationship ended in March of 2008. Appellant

[1] Neel testified that there were a few charges on his credit cards that were automatic monthly deductions.

testified that she was struggling financially at the time and that appellant helped her with utility bills and rent. She testified that she considered appellant's financial help to be a gift and that "our understanding was that he was helping me out and we would work it out in some way." T. at 212.

{¶12} Appellant testified that when Neel was first hospitalized, she visited him two or three times a week, but that her visits phased off to once or twice a week. She testified that while Neel was in the hospital, she talked to his family daily and met with his doctors and other health care providers. She also testified that she took care of his apartment and his cat, picked up his mail and met with his employer a few times to make sure that there was no lapse in his insurance coverage.

{¶13} Appellant testified that Neel gave her permission to use his credit cards and that he told her where they were and how there were to be used. The following testimony was adduced when she was asked if there was any discussion about what was being purchased on them**:**

{¶14} "A. At times there were, when it was something that what I considered to be large. He didn't always consider what I thought was large large, but what I considered to be large, there were discussions about them. As far as miscellaneous things, as far as groceries, gas and things like that, no, we didn't discuss it outside of, you know, we were doing that, but we didn't talk about, okay, it was this much, this much, this much. But such things as a utility bill or the phone, my Verizon cell phone, you know, heat, anything like that, then we did talk about the amount on that." T. at 222-223.

{¶15} Appellant testified that one of those things was heating oil for her house.

{¶16} Appellant also testified that Neel was aware that she used his credit cards to pay for his prescription medications both at the hospital and at pharmacies. She also testified that she used Neel's credit cards to purchase special soaps and mouthwashes for Neel, to purchase gloves for him and to purchase Neel certain foods based on his medical restrictions.

{¶17} On cross-examination, appellant admitted that she made the purchase at Agland Co-op for $216.00, that she paid her Verizon cell phone bill with Neel's credit cards on at least seven occasions, and that she used his credit cards to pay her electric bills, one of which was over $500.00. Appellant also admitted that she used Neel's credit cards to purchase a mattress and on multiple occasions at Certified Oil in Granville. Several times, appellant used the credit cards at Certified Oil more than once a day. According to appellant, she charged several thousand dollars on Neel's credit cards.

{¶18} Appellant also testified that she used Neel's credit cards to have DirecTV hooked up to her house, although she testified that Neel wanted the same installed. Appellant also used Neel's credit cards to make three purchases at Wal-Mart, including one purchase on January 25, 2008, which was a few days after Neel entered the hospital. Appellant testified that most of the purchases made at Wal-Mart were for space heaters to keep her drafty, old house warm for Neel.

{¶19} At the conclusion of the evidence and the end of deliberations, the jury, on February 20, 2009, found appellant guilty of misuse of credit cards, a felony of the fifth degree. The jury specifically found that the value of the property or services involved was $500.00 or more and less that $5,000.00. The jury was unable to reach a verdict as

to the theft count and such count was dismissed pursuant to an Entry filed on February 27, 2009.

{¶20} Pursuant to a Judgment Entry filed on March 27, 2009, appellant was sentenced to six months in prison. The trial court, in its entry, stated that appellant "shall pay restitution for damages caused in this case. The Court retains jurisdiction over the amount of restitution owed."

{¶21} Appellant then filed a Notice of Appeal on April 8, 2009.

{¶22} On April 28, 2009, an Agreed Entry was filed stating that the proper amount of restitution was $3,822.19 and ordering appellant to pay such amount.

{¶23} On December 21, 2009, this Court dismissed the appeal of the March 27, 2009 Judgment Entry pursuant to *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, for lack of a final, appealable order.

{¶24} On February 3, 2010, the trial court issued a Judgment Entry in compliance with *Baker*, and included the proper amount of restitution of $3,822.19.

{¶25} The Appellant filed a Notice of Appeal on February 24, 2010.

{¶26} Appellant now raises the following assignments of error:

{¶27} "I. THE TRIAL COURT ERRED WHEN IT DID NOT INSTRUCT THE JURY ON A NECESSARY ELEMENT OF THE CRIME OF MISUSE OF CREDIT CARD.

{¶28} "II. THE JURY'S VERDICT FINDING RIGGS GUILTY OF MISUSE OF CREDIT CARD IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶29} "III. THE TRIAL COURT ERRED WHEN IT DID NOT SPECIFY THE AMOUNT OF RESTITUTION AT SENTENCING.

I.

{¶30} In the first assignment of error, appellant contends the trial court committed plain error when it failed to properly instruct the jury on a necessary element of the charge of misuse of a credit. Appellant was charged under R.C. 2913.21(B)(2), which states:

{¶31} "No person, with purpose to defraud, shall do any of the following:

{¶32} " * * *

{¶33} "(2) Obtain property or services by the use of a credit card, in one or more transactions, knowing or having reasonable cause to believe that the card has expired or been revoked, or was obtained, is retained, or is being used in violation of law.

{¶34} Appellant argues the trial court failed to include in its jury instructions an "explanation as to how Riggs allegedly obtained, retained, or used credit cards in violation of law". Appellant's Brief, p. 4.

{¶35} The jury was instructed on this issue as follows: "In deciding whether the Defendant had a reasonable cause to believe that the credit card or cards were obtained, retained, or being used in violation of law, you must decide from all the facts and circumstances in evidence whether a person of ordinary prudence and care would have believed that the credit card or cards had been obtained, retained, or were being used in violation of law." T. at 308.

{¶36} This instruction mirrors appellant's proposed jury instruction, filed February 12, 2009. In addition, no objection was made at trial to the instruction.

{¶37} During deliberations, the jury presented a question: "We need someone to clarify 'reasonable cause to believe.' We are not sure of wording in the court (sic)."

{¶38} The transcript reflects the following discussion between the trial court and counsel:

{¶39} "The Court: "They need that clarified? I guess I'm uncertain as to what they need clarified. I think that's pretty clear. It's pretty basic.

{¶40} "[Prosecutor]: Your Honor, I think they've already been informed of the definition of reasonable cause, and I would ask them to refer back to the definition given to them.

{¶41} "[Defense Counsel]: I know that part of the definition that was struck - - not part of this definition, but part of the original definition indicated what violation of law and maybe that's where they're confused of what constitutes a violation of law.

{¶42} "The Court: I guess we could send a note back asking what clarification do you need. Is that agreeable?

{¶43} "[Prosecutor]: Yes, Your Honor.

{¶44} "[Defense Counsel]: Yes, Your Honor.

{¶45} T. at 324

{¶46} The record contains no further discussion or information about this issue.

{¶47} Appellant contends on appeal the trial court should have instructed the jury with Ohio Jury Instruction CR 513.21, which provides: "(B)(2) with purpose to defraud, obtained (property)(services) by use of a credit card, (knowing) (having reason cause to believe) that the card (had expired) (had been revoked) (was obtained, retained, or being used [describe applicable statutory violation]).

{¶48} Appellant submits that since the jury hung on the theft charge, there was no basis to find that she misused the credit cards in violation of any law. Appellant argues she was denied a fair trial because the jury was not instructed on all elements that must be proved to establish the crime of misuse of a credit card. Since appellant did not object to the trial court's jury instructions as given, appellant concedes she has waived all but plain error in this regard.

{¶49} Under Crim.R. 52(B), plain errors affecting substantial rights may be noticed by an appellate court even though they were not brought to the attention of the trial court. To constitute plain error, there must be: (1) an error, i.e., a deviation from a legal rule, (2) that is plain or obvious, and (3) that affected substantial rights, i.e. affected the outcome of the trial. *State v. Barnes* (2002), 94 Ohio St.3d 21, 27. Even if error satisfies these prongs, appellate courts are not required to correct the error. Appellate courts retain discretion to correct plain errors. *Id.* Courts are to notice plain error under Crim.R. 52(B), " 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' *Id.* (citation omitted).

{¶50} In *State v. Adams* (1980), 62 Ohio St.2d 151, the Ohio Supreme Court held that the failure to separately and specifically instruct the jury on every essential element of each crime with which an accused is charged does not per se constitute plain error, but that under such circumstances plain error review requires the examination of the record in each individual case. *Id.* at paragraph two of syllabus.

{¶51} " A jury charge must be considered as a whole and a reviewing court must determine whether the jury charge probably misled the jury on a matter materially

affecting the complaining party's substantial rights." *Becker v. Lake Cty. Mem. Hosp. West* (1990), 53 Ohio St.3d 202, 208.

{¶52} Appellate courts have noted that strict compliance with Ohio Jury Instructions is not mandatory, instead the instructions are "recommended instructions" to assist judges in charging the jury and that deviation from the model instructions does not necessarily constitute error by the trial court. *State v. Miller*, 2nd Dist. No. 22433, 2009-Ohio-4607, citing *State v. Martens* (1993), 90 Ohio App.3d 338, 343.

{¶53} We find the trial court's failure to give an additional instruction was not plain error. The central issue at trial in this matter was whether appellant had Neel's permission to take the credit cards and then make the numerous charges. Based upon the evidence adduced at trial, the jury could have failed to reach a verdict on the issue of whether appellant stole the credit cards, but could have found she did not have authorization from Neel to make the specific charges at issue. Additionally, the jury was instructed that each count in the indictment constituted a separate and distinct matter, and that the appellant may be found guilty or not guilty of any one or all of the offenses. T. at 304. The jury was further instructed on the specific meanings of terms "defraud" and "deception" so that "a person of ordinary prudence and care" would believe that use of the credit card under the circumstances of this case would be a violation of law. For example, testimony was adduced that appellant represented to the clerk at Agland that the credit card belonged to her mother. The jury also could have inferred that appellant's assistance to Neel was motivated not by friendship, but to obtain by deception a financial gain. Although the offense of theft by deception, R.C. 2913.02(3),

was not specifically delineated in the jury instructions on the offense of misuse of credit cards, the charge to the jury encompassed the necessary elements of that offense.

{¶54} We also determine that the jury's question during deliberations, without any further development in the record, is insufficient to indicate confusion over this particular instruction.

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

II.

{¶56} In the second assignment of error, appellant asserts a weight of the evidence challenge. Appellant contends that since the jury could not decide whether to believe Neel or appellant on the issue of how she obtained his credit cards (ie. whether appellant stole them or was given them), and the State's case was based upon the assumption that she stole them for her benefit, then the jury clearly lost its way in convicting Appellant of misusing the cards. We disagree.

{¶57} When analyzing a manifest weight claim, this Court sits as a "thirteenth juror" and in 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." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541, 548, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶58} The evidence introduced at trial supports appellant's conviction. Neel testified that the parties were platonic friends, and upon returning to this apartment after

receiving word that he was in remission, he began receiving his regular mail.[2] Shortly thereafter he received credit card statements containing charges on four different credit cards that he was unaware of and did not authorize. He discovered the credit cards were missing from his drawer. Thereafter, he contacted appellant who told him where the cards were located. Neel then filed fraud claims with the credit card companies and filed a police report.

{¶59} Although the jury could not determine whether appellant unlawfully obtained the credit cards, we do not find that the jury clearly lost its way in convicting appellant of misuse of the credit cards. Appellant charged several thousand dollars for merchandise and utilities over a short period of time during Neel's hospitalization and did not receive his permission to make the charges, if the trier of fact credited Neel's testimony, which obviously was the case.

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

III.

{¶61} In her last assignment of error, Appellant contends the trial court erred in failing to set the actual amount of restitution at the time of the March 29, 2009 sentencing hearing. We agree.

{¶62} At the sentencing hearing on March 27, 2009, the trial court ordered restitution but did not have the calculation of damages at that time. The prosecutor indicated she would have the information later that day. The Sentencing Entry filed later the same day ordered Appellant to pay restitution, but did not set an amount. Rather entry stated: "[t]he Court retains jurisdiction over the amount of restitution owed." After

[2] Neel testified that during his hospital stays his mail went directly to his brother's home and then his brother gave the bills to Appellant.

Appellant's notice of appeal was initially filed, an Agreed Entry was filed setting the amount of restitution at $3,822.19. However, this Court dismissed the original appeal and the Sentencing Entry now before this Court contains a specific amount of restitution.

{¶63} Nevertheless, we find the trial court erred in failing to set the amount of restitution after the sentencing hearing. R.C. 2929.18(A)(1) provides, in pertinent part, that "[i]f the court imposes restitution, at sentencing, the court shall determine the amount of restitution to be made by the offender." This Court, as well as other appellate courts, have held that R.C. 2929.18(A)(1) requires the trial court to determine the amount of restitution at sentencing. *State v. Carr*, 5th Dist. No. 2007AP120076, 2008-Ohio-3423, ¶ 17, citing *State v. Purnell*, 171 Ohio App.3d 446, 2006-Ohio-6160.

{¶64} When this Court remanded this matter pursuant to *Baker*, Appellant was not present for the imposition of the sentence, which imposed the exact amount of restitution.

{¶65} We sustain appellant's third assignment of error. We remand the case to the trial court to resentence Appellant in accordance with R.C. 2929.18(A)(1). In all other respects, the appellant's conviction and sentence is affirmed.

By: Delaney, J.

Farmer, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE

[Cite as *State v. Riggs*, 2010-Ohio-5697.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
TERESA RIGGS	:	
Defendant-Appellant	:	Case No. 2010 CA 20

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Court of Common Pleas is affirmed in part, sentence vacated in part, and cause remanded to proceeding consistent with the Memorandum-Opinion. Costs assessed equally to the parties.

_____
HON. PATRICIA A. DELANEY

_____
HON. SHEILA G. FARMER

_____
HON. JOHN W. WISE