[Cite as *State v. Hart*, 2004-Ohio-5511.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-03-1073

Appellee — Trial Court No. CR-2002-3438

v.

Houston Hart — **DECISION AND JUDGMENT ENTRY**

Appellant — Decided: October 15, 2004

* * * * *

Julia R. Bates, Prosecuting Attorney, and Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellee.

Carol Damrauer-Viren, for appellant.

* * * * *

HANDWORK, P. J.

{¶ 1} Appellant, Houston Hart, appeals his conviction on the lesser included offense of robbery, in violation of R.C. 2911.02(A)(3), a felony of the third degree. Hart contends that the following errors occurred in the proceedings below:

{¶ 2} "The trial court abused its discretion by denying defendant-appellant's motions permitting his retained counsel to withdraw, and a continuance for defendant-

appellant to retain other counsel. This abuse of discretion denied him his right to due process in violation of the Ohio and United States Constitutions."

{¶ 3} "Defendant-appellant's conviction is supported by insufficient evidence, and is against the weight of the evidence, and therefore a denial of his right to due process of law."

{¶ 4} "The trial court erred when it ordered the defendant-appellant to pay unspecified court costs, fees, and to make an unspecified, unsubstantiated sum of restitution."

{¶ 5} Sometime between 8:00 p.m. and 9:00 p.m. on August 28, 2002, appellant entered the Kroger supermarket located in a strip mall on the corner of Lewis Avenue and Alexis Road in Toledo, Lucas County, Ohio. Appellant went to the service desk and attempted to cash a payroll check in the amount of approximately $475. The customer service clerk was suspicious of the validity of the check and took it to her supervisor, Benjamin Jameson, who was in a room behind the service desk.

{¶ 6} Jameson testified that the alleged financial institution that issued the check was Key Bank. However, when he compared the routing number on the check to a list kept by Kroger for use in determining whether a particular payroll check is "counterfeit," the routing number was that of MidAm Bank. In addition, Jameson stated that the check was made out on "Versa" paper, a paper known to be used in the making of counterfeit checks.

{¶ 7} Jameson also recalled that the payor on the check was either the "Sunshine" or "Sunset" Nursing Home. Pursuant to procedure established by Kroger

for use under these circumstances, Jameson tried to find the name of the payor in the telephone book and could not find such a listing. At that point, Jameson contacted the store manager and called the police.

{¶ 8} Officer John Knerr of the Toledo Police Department was patrolling the Kroger parking lot when the dispatcher notified him of possible criminal activity in the Kroger supermarket. He answered the dispatcher and informed her that he was on the scene. He then parked and went into the Kroger store where he met Mark Clark, the store manager. Clark was checking appellant's photo identification card. The officer took possession of both the identification card and the check.

{¶ 9} Officer Knerr told appellant "let's go back to the manager's office while I check the check out." Appellant, Officer Knerr, and Clark started to walk toward the manager's office. Appellant inquired: "[W]hat seems to be the problem?" Officer Knerr replied that the check did not "seem to be real." Appellant then stated that he never received any cash in exchange for the check; "so it doesn't involve me." When Officer Knerr told appellant that forging a check was still a felony, appellant pushed the officer and attempted to escape. The two then got into an altercation. Appellant struck the officer in the mouth and kicked him in the shin. Mark Clark also became involved in the fray. At some point during this altercation, Officer Knerr dropped the identification card and the check. After the incident, the officer was only able to find the identification card.

{¶ 10} Eventually, appellant managed to get out of his shirt and ran out of the store into the parking lot, where he was apprehended by Officer Doug Whatmore, who

was responding to the original 911 dispatch. Whatmore arrested appellant, and Officer Knerr drove himself to the hospital.

{¶ 11} Subsequently, appellant was indicted by the Lucas County Grand Jury on one count of robbery in violation of R.C. 2911.02(A)(2), a felony of the second degree. At the commencement of the trial of this case, appellant indicated that he was not satisfied with the performance of his current retained counsel, Martin P. Dow, with respect to discovery matters. He therefore asked the court to "dismiss * * * Mr. Dow off the case" so that appellant could retain other counsel. Attorney Dow also requested that he be permitted to withdraw from the case and asked the court for a continuance so that appellant could retain other counsel. The trial court denied both motions. In denying the motions, the trial judge noted that the case had been pending for "months," that he had cleared his docket for this case, and that a jury[1] was chosen and waiting to proceed.

{¶ 12} After a trial to the bench, the trial court found appellant not guilty of R.C. 2911.02(A)(2), a felony of the second degree, but did find him guilty of the lesser included offense of robbery, a violation of R.C. 2911.02(A)(3), a felony of the third degree. A sentencing hearing was held on February 12, 2003. In his February 13, 2003 judgment entry, the trial judge sentenced appellant to four years in prison. He also ordered appellant to pay "any restitution, all prosecution costs and any fees permitted pursuant to R.C. 2929.18(A)(4)." This timely appeal followed

[1]Appellant subsequently waived his right to a jury trial, and the jury was dismissed.

{¶ 13} In his first assignment of error, appellant contends that the trial court abused its discretion in failing to remove Attorney Dow from this case and in failing to grant his motion for a continuance so that he could retain new counsel.

{¶ 14} The determination of whether to allow an attorney to withdraw from a case is reviewed by an appellate court under the abuse of discretion standard. *State v. Cowans*(1999), 87 Ohio St.3d 68, 73. Likewise, a court's decision to grant or deny a motion for a continuance is a matter within the trial court's discretion. *State v. Murphy* (2001) 91 Ohio St.3d 516, 523, 2001-Ohio-112 (Citation omitted.). A trial court abuses its discretion only when its attitude in reaching a decision is arbitrary, unreasonable or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 15} "When a defendant makes a request for new counsel on the eve of trial, the court 'must decide if the reasons for the defendant's request constitute good cause and are thus sufficiently substantial to justify a continuance of the trial in order to allow new counsel to be obtained.'" *State v. Webb* (August 31, 1984), Lucas App. No. L-84-020, quoting *United States v. Welty* (1982), 674 F.2d 185, 187. The court should examine the defendant's reasons for the request and only grant a substitution of counsel during trial if the defendant has shown good cause. Id. Good cause may consist of a "'conflict of interest, a complete breakdown in communication, or an irreconcilable conflict with his attorney.'" *State v. Rogan*, 2d Dist. No. 2003-Ohio-3780, at ¶7, quoting *Webb*, supra.

{¶ 16} In addition, although a criminal defendant must be given a reasonable initial opportunity to retain the counsel of his choice, a court may decline a continuance

for the purpose of retaining new counsel, if in balancing that right against the public's interest in the orderly, prompt, and efficient administration of justice, "the totality of the circumstances indicates that the delay would be unreasonable." *State v. Miller*, 4th Dist. No. 01CA2607, 2001-Ohio-2635. Finally, a motion to remove counsel on the day of trial suggests that the motion was "'made in bad faith for the purposes of delay.'" *Miller*, supra, quoting *State v. Haberek* (1988), 47 Ohio St.3d 35, 41.

{¶ 17} As the rationale for desiring a new attorney on the day of trial, appellant simply stated, "I'm not prepared to go to trial." The transcript reveals, however, that appellant's only previous concern was discovery. Both Attorney Dow and the prosecutor indicated that all matters subject to discovery were completed. Furthermore, Dow was appellant's attorney from the inception of this case and had been granted one previous continuance. The record reveals that he was also representing appellant in two related charges in Toledo Municipal Court and that appellant was aware that these other cases existed.

{¶ 18} Although he asked the court to allow him to withdraw from the case, Attorney Dow first stated that he was prepared to go to trial. He also recognized the fact that the trial date was chosen "quite a while ago." The only reason for withdrawal provided by counsel was that his client did not want him to proceed in the case and that it would be in appellant's "best interest" to obtain new counsel because "all this time has been charged against him."

{¶ 19} In reviewing the totality of the circumstances of this case, we cannot say that the trial court abused its discretion in denying appellant's last minute request to

remove his attorney and/or Attorney Dow's motion to withdraw. Neither appellant nor Dow pointed to any conflict of interest, a complete breakdown in communication between appellant and his attorney, or any irreconcilable conflict between attorney and client.

{¶ 20} Moreover, Attorney Dow was appellant's counsel throughout all pre-trial proceedings. Appellant never raised any question concerning Dow's ability to represent his client's interests until the day of trial. It was only after a jury was empaneled and the trial judge was ready to commence the trial that appellant raised any issues that he had with his current counsel, thereby suggesting that appellant's request was made in bad faith. Therefore, the trial court did not abuse its discretion in denying appellant's motion to remove Attorney Dow as his counsel or in denying Attorney Dow's motion to withdraw. It follows that the court did not abuse its discretion in denying the motion for a continuance. For these reasons, we find appellant's first assignment of error not well-taken.

{¶ 21} In his second assignment of error, appellant challenges his conviction on the basis that it is supported by insufficient evidence and is against the manifest weight of the evidence. In particular, he claims that, due to the lack of the check itself and the witnesses' alleged inability to recall the exact name of the payor on the check, the state failed to establish that he either attempted or committed a theft offense.

{¶ 22} A claim of insufficient evidence raises a due process concern. It brings into play the question of whether the evidence is legally sufficient to support the jury verdict as a matter of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386; *State v.*

Martin (1983), 20 Ohio App.3d 172, 175. In reviewing the sufficiency of the evidence, "the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99.

{¶ 23} When we are asked to determine whether a conviction is against the manifest weight of the evidence, we must "examine whether the evidence produced at trial 'attains the high degree of probative force and certainty required of a criminal conviction.'" *State v. Tibbetts* (2001), 92 Ohio St.3d 146, 163, quoting *State v. Getsy* (1998), 84 Ohio St.3d 180, 193. Therefore, we must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether the trier of fact 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. Scott*, 101 Ohio St.3d 31, 2004-Ohio-10, at ¶32.

{¶ 24} Appellant was convicted of one count of R.C. 2911.02, which provides, in material part:

{¶ 25} "(A) No person in attempting to commit or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:

{¶ 26} "(1) * * *

{¶ 27} "(2) * * *

{¶ 28} "(3) Use or threaten the immediate use of force against another."

{¶ 29} "Theft" is defined as, among other things, acting with the purpose to deprive an owner of property by knowingly obtaining or exerting control over the property through deception. R.C. 2913.02(A)(3).

{¶ 30} In viewing the facts offered at appellant's trial in a light most favorable to the prosecution, we find that any rational trier of fact could conclude that all of the essential elements of R.C. 2911.02(A)(3) were proven beyond a reasonable doubt. Despite the fact that the check itself was not available for production at trial, direct evidence through the testimony of the witnesses in this case was provided to establish that the check was spurious. Jameson testified that the paper on which the check was printed was suspicious because this type of paper is often used for counterfeit checks. He further stated that the routing number on the check was incompatible with the bank named on the check. Jameson also swore that he attempted to find the address and telephone number of the payor on the check and could not do so. The fact that Jameson could not recall the exact name of the payor on the check involves the credibility of this witness and the weight to be accorded his testimony, a matter to be decided in this case by the trial judge. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Thus, it is not a matter reviewed by this court in determining the sufficiency of the evidence. Finally, Officer Knerr, Officer Whatmore, and the other witnesses

provided evidence establishing, beyond a reasonable doubt, the force used by appellant as he fled the scene after attempting to obtain cash by means of deception. Accordingly, appellant's sufficiency of the evidence argument must fail.

{¶ 31} With regard to the manifest weight argument, upon our independent evaluation of all of the above direct evidence, as well as circumstantial evidence, including appellant's flight, see *State v. Williams* (1997), 79 Ohio St.3d 1, 11and *State v. Taylor* (1997), 78 Ohio St.3d 15, 27, we find that the trial judge did not "clearly lose his way" and "create such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Consequently, appellant's second assignment of error is found not well-taken.

{¶ 32} Appellant's third assignment of error challenges the trial court's order requiring appellant "pay any restitution, all prosecution costs and fees permitted pursuant to R.C. 2929.18(A)(4)." Appellee, the state of Ohio, concurs that the trial court could not require appellant to pay restitution without determining the exact amount. We agree. The record of this case discloses no evidence of the actual loss suffered as the result of appellant's criminal conduct in this case. See *State v. Deering*, 6th Dist. No. L-02-1050, 2003-Ohio-2524, at ¶8, quoting *State v. King* (Feb. 27, 1998), 6th Dist. No. WD-97-015.

{¶ 33} Appellee contends, however, that, pursuant to R.C. 2947.23, the trial court properly ordered appellant to pay the costs of prosecution. Additionally, appellee apparently believes that ordering appellant to pay "any fees permitted pursuant to R.C. 2929.18(A)(4)" is also proper.

{¶ 34} Pursuant to R.C. 2947.23, the trial court was required to "include in the sentence the costs of prosecution and render a judgment against the defendant for such costs." Nonetheless, the trial court could not order appellant to pay the costs of confinement as a part of a sanction, see R.C. 2929.18(A)(4), unless the court considered, pursuant to R.C. 2929.19(B)(6), "the offender's present and future ability to pay." *State v. Dearing*, at ¶5 (Citations omitted.). Even though the lower court was not required to hold a hearing on this issue, see R.C. 2929.18(E), the record must contain some evidence that the court considered the defendant's present and future ability to pay the sanction imposed. Id., quoting *State v. Holmes* (Nov. 8, 2002), 6th Dist. No. L-01-1459, 2002 Ohio 6185, at ¶21.

{¶ 35} In the present case, the presentence investigation report indicates that appellant is unemployed, but that he stated that he receives "social security benefits for a mental disability" and does "odd jobs for friends and family." The fact that appellant receives social security benefits was never verified. However, while there is evidence in the record that appellant has some type of income, there is no evidence in the record showing that the court questioned appellant concerning this income in order to ascertain his present and future ability to pay the imposed fees. Therefore, the court erred in imposing said fees, as well as in ordering appellant to pay restitution. The court did not, nonetheless, err in ordering appellant to pay the costs of prosecution. For these reasons, appellant's third assignment of error is found well-taken, in part, and not well-taken in part.

{¶ 36} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed in all respects except the court's imposition of fees pursuant to R.C. 2929.18(A)(4) and the order of restitution. This cause is remanded to the trial court for further consideration of these issues only. The state is ordered to pay the costs of this appeal. See App.R. 24.

JUDGMENT AFFIRMED, IN PART,
AND REVERSED, IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Peter M. Handwork, P.J. _____
JUDGE

Richard W. Knepper, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
CONCUR.
JUDGE