[Cite as *State v. Gaines*, 2010-Ohio-91.]

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

State of Ohio — Court of Appeals No. WD-08-058

Appellee — Trial Court No. 2008CR0212

v.

Martin Gaines — **DECISION AND JUDGMENT**

Appellant — Decided: January 15, 2010

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
Heather M. Baker, Assistant Prosecuting Attorney, for appellee.

Lawrence A. Gold, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} Appellant, Martin Gaines, appeals a judgment of the Wood County Court of Common Pleas and claims that the following errors occurred in the proceedings below:

{¶ 2} "I. Appellant's consecutive sentence violated appellant's right to due process under the Sixth and Fourteenth Amendment to the United States Constitution and Section 5 and 16, Article I and Section Four, Article IV of the Ohio Constitution.

{¶ 3} "II. Appellant's sentence for convictions of forgery and misuse of credit cards should have been merged by the Court on the grounds of allied offenses of a similar import.

{¶ 4} "III. Appellant received ineffective assistance of Counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, section 10 of the Constitution of the State of Ohio.

{¶ 5} "IV. Appellant's conviction was against the manifest weight of the evidence presented by the State, and contrary to law.

{¶ 6} "V. The trial court committed error by imposing an award of restitution without an evidentiary basis."

{¶ 7} On December 18, 2007, Penny Herbach drove to a YMCA located in Perrysburg, Wood County, Ohio, in order to "work out." Herbach went into the YMCA leaving her purse, which contained her credit card, in her locked motor vehicle. Less than one-half hour later, she learned that the window of her car was broken and that her purse was removed from her vehicle. When she arrived home shortly after the incident, Herbach discovered that her credit card had already been used to purchase an item costing over $500 at Kmart.

{¶ 8} On January 2, 2008, Laura Sniadanko went to the Perrysburg YMCA with her child. She left her purse on the passenger seat of her locked automobile. When she returned to her car, the driver's side window of the vehicle was broken, and her purse was missing. On the same date that Sniadanko's purse was taken, a male, who was later identified as appellant, attempted to use her credit card to purchase CB equipment at a Pilot Travel Center located in Lake Township, Wood County, Ohio. The credit card was declined. At that point, the salesperson, Scott Andrews, noticed that the credit card was issued in the name of a woman and the party attempting to purchase the equipment was a male. He then "went to management" with the credit card. When he returned, the male was no longer in the store.

{¶ 9} Detective Nick Cook of the Perrysburg Police Department investigated the theft of Herbach's credit card. He had one of the Perrysburg police officers go to the Kmart where her card was used to retrieve the videotape of the individual who used that card. The detective was able to create a "still image" of the purchaser from the videotape, but Cook was unable to identify him. In early January 2008, however, Detective Mick Lento of the Lake Township Police Department contacted Cook and informed him of the facts surrounding the theft of Sniadanko's purse and the attempted use of her credit card at the Pilot Travel Center.

{¶ 10} Detective Cook and Detective Lento then met at the Lake Township Police Department and went to the travel center. After viewing the videotape of the attempted transaction using Sniadanko's credit card, Detective Cook remembered a previous

investigation in which Martin Gaines was involved. That case also concerned the use of a stolen credit card to purchase CB equipment. At that point, the detectives returned to the police department where they "pulled up" appellant's Ohio driver's license. The driver's license was issued the day before the theft of Herbach's purse. Cook believed that appellant was wearing the same jacket he wore for his driver's license photo that he had on in the videotape of the transaction at Kmart. Therefore, Cook prepared a photo array. When the Kmart store manager, Scott Croft, viewed the photo array, he identified appellant as the person who used Herbach's credit card on December 18, 2007. Likewise, Detective Lento composed a photo array, which he showed to Scott Andrews. Andrews also chose the photograph of appellant as the individual who attempted to purchase CB equipment on January 2, 2008.

{¶ 11} Based upon the positive identifications, appellant was arrested. The Wood County Grand Jury indicted Gaines on (1) one count of forgery, a violation of R.C. 2913.31(A)(1), a felony of the fifth degree; (2) two counts of receiving stolen property, both violations of R.C. 2913.51(A), felonies of the fifth degree; (3) misuse of a credit card, a violation of R.C. 2913.21(B)(2), a felony of the fifth degree; and(4) receiving stolen property, a violation of R.C. 2913.51(A), a felony of the fifth degree. After a jury trial, appellant was found guilty on all counts in the indictment. The jury further determined that as to Counts 2 and 4, the property involved was a credit card and as to Count 3 that the property or services obtained was $500 or more.

{¶ 12} After holding a sentencing hearing, the common pleas court sentenced appellant to 12 months in prison on each count, to be served consecutively, or an aggregate of four years of incarceration. The court also notified appellant that he may be subject to postrelease control and ordered him to pay restitution and the costs of prosecution.

{¶ 13} Because it relates to alleged error occurring pre-trial, we shall first address appellant's Assignment of Error No. III. In that assignment of error, appellant contends that his trial counsel was ineffective because he failed to file a motion to suppress the identifications made through the use of the photo arrays. In particular, he argues that the photo arrays were suggestive because his image was larger than the other photographs used in each array.

{¶ 14} In *Strickland v. Washington* (1984), 466 U.S. 668, 687, the United States Supreme Court devised a two prong test to determine ineffective assistance of counsel. In order to demonstrate ineffective assistance of counsel, an accused must satisfy both prongs. Id. First, he must show that his trial counsel's performance was so deficient that the attorney was not functioning as the counsel guaranteed by the Sixth Amendment of the United States Constitution. Id. Second, he must establish that counsel's "deficient performance prejudiced the defense." Id. The failure to prove any one prong of the *Strickland* two part test makes it unnecessary for a court to consider the other prong. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000-Ohio-448, citing *Strickland* at 697. In

Ohio, a properly licensed attorney is presumed competent. *State v. Lott* (1990), 51 Ohio St.3d 160, 174.

{¶ 15} Photo array evidence is suppressed only if the identification, or method of identification, is unduly suggestive and unreliable. *State v. Waddy* (1992), 63 Ohio St.3d 424, 438, citing *Neil v. Biggers* (1972), 409 U.S. 188. A court takes into account the following factors in determining the reliability and suggestiveness of the challenged identification: "the witness's opportunity to view * * * the defendant during the crime, the witness's degree of attention, the accuracy of the witness's prior description of the suspect, the witness's certainty, and the time elapsed between the crime and the identification." Id. at 439, citing *Neil*, 409 U.S. at 199-200. In addition, if a pretrial photographic identification is followed by an eyewitness identification at trial, the photographic identification can be suppressed only if the procedure was suggestive enough to create "a very substantial likelihood of irreparable misidentification." *Simmons v. United States* (1968), 390 U.S. 377, 384.

{¶ 16} In the present case, Scott Croft, the Kmart manager testified that he saw appellant the first time that he came to the store on December 18, 2007, and was able to make a purchase with Herbach's credit card. He also dealt with appellant on a face-to-face basis when appellant returned to the store, attempted to make a second purchase with that card, and it was declined. At that point, Croft suggested that appellant apply for his own Sears-Kmart credit card, and appellant "said yes." Nonetheless, when Croft asked appellant for his driver's license, Gaines claimed that it was in his motor vehicle.

Appellant then left the Kmart, ostensibly to retrieve his driver's license; however, he never returned.

{¶ 17} Croft's photo array identification of appellant occurred on January 7, 2008, slightly less than three weeks after Gaines' attempted second use of Herbach's credit card at Kmart. While the copy of appellant's driver's license photo appears to be slightly darker that the other photographs in the array, his image is comparable in size to those of the other individuals in the array. Furthermore, Croft also made an in-court identification of appellant as the person that successfully used and then unsuccessfully attempted to use Herbach's credit card a second time at Kmart on December 18, 2007. Accordingly we conclude that the process used to obtain photographic identification of appellant was not so suggestive that it created a substantial likelihood of irreparable misidentification by Scott Croft.

{¶ 18} Appellant also asserts that appellant's trial counsel was ineffective for failing to file a motion to suppress the identification made by Scott Andrews, the cashier at the Pilot Travel Center, because Gaines' image is larger in the photo array shown to Andrews than the other five photographs in that array. We disagree. A review of that photo array shows that all six photographs are the same size and that all of the men in the array have very similar features. Andrews testified that appellant presented two separate credit cards in his attempt to purchase the CB equipment. Both of the cards were declined. At that point Andrews noticed that the second credit card was in a woman's name and went to speak with his manager. When Andrews returned to his station,

appellant was gone, leaving the merchandise on the counter. Andrews identified appellant as the person that tried to purchase the CB equipment with the two credit cards on January 4, 2008--only two days after the attempted purchases. Furthermore, Andrews identified appellant at trial as that individual. Therefore, we find that the process used to obtain photographic identification of appellant was not so suggestive that it created a substantial likelihood of irreparable misidentification by Scott Andrews.

{¶ 19} Accordingly, appellant's trial counsel did not fail in any duty owed to appellant by failing to file a motion to suppress the witness identifications of appellant made from the two photo arrays, and appellant's Assignment of Error No. III is found not well-taken.

{¶ 20} In his Assignment of Error No. IV, appellant urges that his four convictions are against the manifest weight of the evidence. Nevertheless, in the body of this assignment of error, Gaines argues only that insufficient evidence was offered to obtain his convictions; therefore, the trial court erred in overruling his Crim.R. 29 motion for acquittal. Generally, errors not separately argued or supported by the briefs may be disregarded. See App.R. 12(A)(2). Although appellant fails to set forth any arguments with regard to manifest weight, we shall, in the interest of justice, consider the merits of both his named assignment of error and the denial of his motion for acquittal. See *Aegis v. Sedlacko*, 7th Dist. No. 07-MA-128, 2008-Ohio-3190, ¶ 15.

{¶ 21} Sufficiency of the evidence and manifest weight of the evidence are quantitatively and qualitatively different legal concepts. *State v. Thompkins* (1997), 78

Ohio St.3d 380, 386. Crim.R. 29(A) provides that a court shall order an entry of judgment of acquittal if the evidence is insufficient to sustain a conviction of the offenses. "Sufficiency" involves a question of law as to whether the evidence offered at trial is legally adequate to support a jury verdict as to all elements of a crime. Id. In determining sufficiency of the evidence, an appellate court must decide 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.

{¶ 22} On the other hand, when considering whether a conviction is against the manifest weight in a jury trial, an appellate court sits as the "thirteenth juror" and may disagree with the factfinder's resolution of the conflicting testimony. *State v. Thompkins,* 78 Ohio St.3d 380, 387, 1997-Ohio-52. The appellate court reviews "'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.'" Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 23} We shall first set forth the elements of the offenses charged in this cause.

{¶ 24} R.C. 2913.31 defines the offense of forgery and provides, in material part:

{¶ 25} "(A) No person with purpose to defraud, or knowing that the person is facilitating a fraud, shall do any of the following:

{¶ 26} "(1) Forge any writing of another without the other person's authority; "

{¶ 27} R.C. 2913.51(A) reads: "[n]o person shall receive, retain, or dispose of the property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense." One commits a "theft" when he knowingly deprives an owner of property or services without the consent of the owner or person authorized to give consent. See R.C. 2913.02(A)(1).

{¶ 28} R.C. 2913.21(B)(2) states, in relevant part, that "no person, with purpose to defraud, shall * * * [o]btain 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 * * * was obtained, is retained, or is being used in violation of law."

{¶ 29} Here, in reviewing all of the evidence offered at trial in a light most favorable to appellee, we conclude that all of the elements of the charged offenses were proven beyond a reasonable doubt. Furthermore, upon our review of the entire record of this cause we cannot say that the jury clearly lost its way and created such a manifest miscarriage of justice that appellant's convictions must be reversed and a new trial ordered. Accordingly, appellant's Assignment of Error No. IV is found not well-taken.

{¶ 30} Appellant's Assignment of Error No. I contends that by imposing consecutive sentences, the trial court violated his right to due process under the Sixth and Fourteenth Amendments to the United States Constitution; Sections 5 and 16, Article I, Ohio Constitution; and Section 4, Article IV, Ohio Constitution. Specifically, appellant argues that after the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-586, the trial court lacked the requisite subject matter jurisdiction to impose

consecutive sentences. Appellant reaches this conclusion by reasoning that because the *Foster* court struck down certain statutory provisions, including that provision governing the imposition of consecutive sentences, that required judicial fact finding, a court no longer has the jurisdiction or authority to impose consecutive sentences. Again, we must disagree with appellant's supposition.

{¶ 31} In *Foster,* Ohio's high court struck down R.C. 2929.14(E)(4) and 2929.41(A) as being unconstitutional because they required judicial fact finding of "facts not proven to a jury beyond a reasonable doubt or admitted by the defendant before the imposition of consecutive sentences." Id. at paragraph three of the syllabus. These statutes were, therefore, severed from Ohio's sentencing scheme. Id. at paragraph four of the syllabus. The *Foster* court then held, however, that trial courts have "full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than minimum sentences." Id. Thus, the holding in *Foster* grants a trial judge the authority to impose consecutive sentences.

{¶ 32} Appellant points out, nonetheless, that in a recent United States Supreme Court case, a majority of the justices found that the Sixth Amendment to the United States Constitution does not bar a state legislature from enacting a statute that allows a trial judge to enter a finding of fact necessary to impose consecutive, rather then concurrent, sentences for multiple disparate offenses. See *Oregon v. Ice* (2009), 129 S.Ct. 711. While we agree that the *Ice* court made such a ruling, no holding in that case

precludes a state from permitting a trial court to, in its discretion, impose consecutive rather than concurrent sentences. For the foregoing reasons, appellant's Assignment of Error No. I is found not well-taken.

{¶ 33} In his Assignment of Error No. II, appellant maintains that his sentences for his convictions of forgery and the misuse of credit cards should have been merged because they are allied offenses of a similar import.

{¶ 34} R.C. 2941.25 reads:

{¶ 35} "A) Where the same conduct by the 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.

{¶ 36} "(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 them."

{¶ 37} R.C. 2941.25 requires a two-step analysis. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, ¶ 14 (Citations omitted.). "'In the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. In the second step, the defendant's conduct is reviewed to determine whether the

defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses.'" Id. quoting *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117. While the crimes are examined in the abstract, the law does not require a strict textual comparison under R.C. 2941.25(A). Id. at ¶ 26.

{¶ 38} As noted infra, the offenses of forgery and misuse of a credit card are defined as follows:

{¶ 39} R.C. 2913.31 reads:

{¶ 40} "(A) No person with purpose to defraud, or knowing that the person is facilitating a fraud, shall do any of the following:

{¶ 41} "(1) Forge any writing of another without the other person's authority; "

{¶ 42} R.C. 2913.21(B)(2) states, in relevant part, that "no person, with purpose to defraud, shall * * * [o]btain 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 * * * was obtained, is retained, or is being used in violation of law."

{¶ 43} In comparing the elements of both offenses, it is clear that forgery can be committed without committing the offense of misuse of a credit card. For example, one can sign another's name on a check without the authorization of that person. Moreover, a forgery offense can be committed even in an instance where the person does not obtain property or services. Consequently, forgery and misuse of a credit card are not allied

offenses of a similar import, and appellant's Assignment of Error No. II is found not well-taken.

{¶ 44} Finally, in his Assignment of Error No. V, appellant argues that the trial court erred in entering an order of restitution that lacks an evidentiary basis. R.C. 2929.18(A)(1) provides, in part, that restitution by the offender may be made to a victim in the actual amount of the victim's loss. See, also, *State v. Brumback* (1996), 109 Ohio App.3d 65, 82. Therefore, the record of a case must (1) contain some competent and credible evidence from which the court may ascertain the amount of restitution to a reasonable degree of certainty, *State v. Warner* (1990), 55 Ohio St.3d 31, 69; and (2) the victim's loss must be substantiated through documentary evidence or testimony, *State v. Marbury* (1995), 104 Ohio App.3d 179, 181.

{¶ 45} At appellant's sentencing hearing, the trial judge verbally stated the amount of the losses; e.g., $282.89 for a side automobile window, suffered by Penny Herbach. Nevertheless, there is no testimonial or documentary evidence in the record of this cause to substantiate the amounts cited by the judge. Therefore, the trial court could not order appellant to pay restitution in the amount of $435.77 to Herbach. Accordingly, appellant's Assignment of Error No. V is found well-taken.

{¶ 46} The judgment of the Wood County Court of Common Pleas is affirmed in all respects except for the inclusion of $435.77 in restitution to Ms. Herbach in the sentence imposed. That provision, and that provision only, is ordered reversed and vacated, and this cause is remanded to the trial court for further proceedings consistent

with this judgment. See *State v. Scott*, 6th Dist. No. L-01-1337, 2003-Ohio-1402, ¶ 36.

Appellant is ordered to pay the costs of this appeal.

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.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE