[Cite as *State v. Moran*, 2013-Ohio-724.]

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

State of Ohio	Court of Appeals No. WD-11-042
Appellee	Trial Court No. 2009CR0570
v.	
Dawn Moran	**DECISION AND JUDGMENT**
Appellant	Decided: March 1, 2013

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
Jacqueline M. Kirian, Assistant Prosecuting Attorney, for appellee.

Eric Allen Marks, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals a judgment of conviction for receiving stolen property and telecommunications fraud entered on a jury verdict in the Wood County Court of Common Pleas. Because we conclude that the trial court acted within its discretion in

excluding evidence of a deceased son's gambling habits in a trial accusing his former girlfriend of disposing of his mother's stolen jewelry, we affirm.

{¶ 2} Appellant, Dawn Moran, dated Barry Barnes for nine years. The couple frequently stayed over at the Tontogany home of Barnes' mother, Audrey Barnes. Audrey Barnes kept a locked strongbox under her bed in which she kept jewelry and other valuables.

{¶ 3} In April 2009, Audrey Barnes looked under her bed for the strongbox to obtain jewelry to wear. The box was gone. Audrey Barnes, her son and appellant searched throughout the house for the box, but found nothing.

{¶ 4} Audrey Barnes, at the suggestion of her insurer, reported the loss to the Wood County Sheriff's Office. Since Audrey Barnes could suggest no suspects and there were no signs of forced entry, the case went inactive after a month. Sometime later, the relationship between Barry Barnes and appellant ended.

{¶ 5} Audrey Barnes began to suspect that appellant was responsible for the disappearance of her strongbox and jewelry. Audrey Barnes knew appellant had bought and sold goods on the online auction site eBay. Indeed, Audrey's neighbor had assisted appellant in setting up her account.

{¶ 6} With the aid of the neighbor, Audrey accessed the items for sale by an individual with the username "dippledawn," the name Audrey believed appellant used on eBay. According to Audrey Barnes' trial testimony, when she viewed the items for sale

by “dippledawn,” Audrey recognized several pieces of jewelry that had been in the missing strongbox. Audrey Barnes reported this to the sheriff’s office.

{¶ 7} Sheriff’s detectives subpoenaed eBay records, confirming that “dippledawn” was appellant. Detectives also obtained the names and addresses of persons who purchased items Audrey Barnes believed were hers and notified the buyers that they may have purchased stolen goods. One of the buyers contacted detectives and advised them that the buyer was returning to appellant’s address a gold diamond ring that Audrey Barnes identified from the eBay listing as hers.

{¶ 8} Detectives obtained a warrant and intercepted the package with the ring in it. They showed the ring to Audrey Barnes, who identified it as hers. Detectives then obtained a warrant to search appellant’s home. The search resulted in the seizure of a large number of pieces of jewelry, many of which were later identified by Barnes as hers.

{¶ 9} On December 17, 2009, appellant was named in a two-count indictment, charging her with receiving stolen property in violation or R.C. 2913.51(A) and telecommunications fraud in violation of R.C. 2813.05(A), both fourth degree felonies.

{¶ 10} Appellant pled not guilty and the matter proceeded to trial. At the conclusion of the trial, a jury found appellant guilty on both counts of the indictment. The trial court accepted the verdict, entered a finding of guilt and, following a presentence investigation, sentenced appellant to three years of community control, including 150 days of jail time.

{¶ 11} From this judgment of conviction, appellant brings this appeal. Appellant sets forth the following two assignments of error:

I. The trial court erred in sustaining appellee's objection to a line of questioning in violation of appellant's right to due process[.]

II. Appellant's conviction was against the manifest weight of the evidence[.]

I. Evidence Rulings

{¶ 12} Barry Barnes was killed in a snowmobile accident before the beginning of appellant's trial. At trial, appellant sought to introduce testimony suggesting that Barry Barnes had a motive to take the contents of his mother's strongbox and as much, or more, opportunity as appellant.

{¶ 13} To this end, appellant attempted to develop testimony about Barry Barnes' trips to Las Vegas and Detroit casinos, during which time Barnes' gambled for hours and was, in appellant's characterization, a "high roller." Appellant sought to show that, when Barnes won, he spent money lavishly on his friends and companions. In her appeal brief, appellant suggests that, had this testimony been admitted, she would have argued during closing that Barry was a "high roller" who it could be reasonably inferred also lost money gambling—providing a motive for him to steal from his mother.

{¶ 14} The state objected to this testimony as improper evidence of Barnes' character which, due to Barnes' unavailability, unfairly prejudiced the state. The trial court sustained the state's objections, concluding that the probative value of the

testimony was not outweighed by the potential prejudice that could be engendered in its admission.

{¶ 15} The general rule is that all relevant evidence is admissible. Evid.R. 402. "'Relevant evidence' means 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." Evid.R. 401. Nonetheless, even relevant evidence may be excluded if, "its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403(A). With certain exceptions, evidence of a person's character is inadmissible to prove that the person acted in conformity of that character. Evid.R. 404(A). Evidence of other crimes or acts is inadmissible to prove a person's character in order to show that the person acted in conformity with that character, but may be admitted for other purposes "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Evid.R. 404(B).

{¶ 16} The determination of whether to admit "other acts" evidence, like other evidentiary rulings, rests within the sound discretion of the court and will not be reversed absent an abuse of that discretion. *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, syllabus. An abuse of discretion is more than a mistake of law or a lapse in judgment, the term connotes that the court's attitude is arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

{¶ 17} In this matter, the court in some instances conducted an Evid.R. 403 balancing test and found the probative value of the proposed testimony outweighed by the danger of prejudice or confusion of the issues. With respect to the testimony concerning gambling, the court concluded incidents from 2007 and Barry Barnes' generosity on a winning night during a 2008 Detroit casino trip were too remote in time to be relevant.

{¶ 18} It is ordinarily the state, rather than the defendant, that seeks to introduce evidence of "other acts" to show motive or intent or absence of mistake. Nonetheless, the principles remain the same. While other acts evidence may be admissible, its probative value becomes attenuated as the distance in time and the nature of the act become more remote. Evidence of "other acts" too distant in time or too removed from the method or type of act sought to be proved loses all probative value. *State v. Semer*, 6th Dist. No. F-11-005, 2011-Ohio-6502, ¶ 16, citing *State v. Burson*, 38 Ohio St.2d 157, 159, 311 N.E.2d 526 (1974), *State v. Henderson*, 76 Ohio App.3d 290, 294, 601 N.E.2d 596 (12th Dist.1991).

{¶ 19} In this matter, appellant sought to prove that a third person had a motive to steal because he needed money for gambling and lavish expenses. Many people gamble and occasionally live above their means and do not steal, so the type of act sought to be proved is already somewhat removed in relevance from what is sought to be demonstrated. Moreover, the incidents that appellant sought to introduce were at least a year distant from the offense. Considering these things, we cannot say that the trial court

abused its discretion in excluding this line of questioning. In those instances in which the trial court balanced the probative value of evidence against the possibility of prejudice or confusion, we find no suggestion that the court abused its discretion. Accordingly, appellant's first assignment of error is not well-taken.

II. Manifest Weight

{¶ 20} In her second assignment of error, appellant suggests that the verdict was against the manifest weight of the evidence.

{¶ 21} A criminal verdict may be overturned on appeal if it is either against the manifest weight of the evidence or because there is an insufficiency of evidence. In the former, the appeals court acts as a "thirteenth juror" to determine whether the trier of fact lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). In the latter, the court must determine whether the evidence submitted is legally sufficient to support all of the elements of the offense charged. *Id.* at 386-387. Specifically, we must determine whether the state has presented evidence which, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The test is, viewing the evidence in a light most favorable to the prosecution, could any rational trier of fact have found the essential elements of the crime proven beyond a reasonable doubt. *Id.* at 390 (Cook, J., concurring); *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. *See also State v.*

Eley, 56 Ohio St.2d 169, 383 N.E.2d 132 (1978); *State v. Barnes*, 25 Ohio St.3d 203, 495 N.E.2d 922 (1986).

{¶ 22} Appellant was charged with and convicted of receiving stolen property and telecommunications fraud. R.C. 2913.51(A) provides that one who: 1) receives, retains or disposes of, 2) property of another, 3) knowing or having reason to believe that, 4) the property was obtained through theft, is guilty of receiving stolen property. The offense is a fourth degree felony if the value of the property is between $5,000 and $100,000.[1] R.C. 2913.05 defines one guilty of telecommunications fraud as a person who: 1) having devised a scheme to defraud, 2) and uses wire, radio, satellite or telecommunications devices, 3) with purpose, 4) to execute or otherwise further the scheme.

{¶ 23} Crediting the testimony of Audrey Barnes, a reasonable trier of fact could conclude that appellant took, or, at the least, disposed of Audrey Barnes' property knowing that it had been stolen. An insurance company loss estimate introduced into evidence set the replacement value of the property taken as $6,595.63. This is sufficient evidence to satisfy the essential elements of R.C. 2913.51(A). If this is true, there was evidence presented that appellant represented this property as her own and used eBay, an internet site, to further this scheme. We note that the internet is a form of telecommunication that uses wire, radio and satellite. If this evidence is believed, the essential elements of telecommunications fraud are satisfied. As a result there is legally

[1] These values were increased to between $7,500 and $150,000 in 2011. 2011 Am.Sub.H.B. No. 86, Section 1 (effective Sept. 30, 2011).

sufficient evidence to establish the elements of both of the offenses of which appellant was convicted.

{¶ 24} With respect the weight of the evidence, we have carefully examined the transcript of these proceedings and the record as a whole and fail to find any suggestion that the jury lost its way or that any manifest injustice occurred. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 25} On consideration whereof, the judgment of the Wood County Court of Common Pleas is affirmed. It is ordered that appellant pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
JUDGE
CONCUR.