

[Cite as *State v. Ulrich-Feckler*, 2009-Ohio-5965.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92459

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JANET URICH-FECKLER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART; REVERSED
IN PART AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-508573

BEFORE: Sweeney, J., Gallagher, P.J., and Celebrezze, J.

RELEASED: November 12, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Janet Urich-Feckler, (“defendant”), appeals her convictions for welfare fraud and theft by deception. For the reasons that follow, we affirm in part, reverse in part and remand.

{¶ 2} Defendant was charged with two counts of workers’ compensation fraud in violation of R.C. 2913.48(A)(1) and/or (A)(2), felonies of the fourth and fifth degree, respectively, and a violation of R.C. 2913.02(A)(3), theft by deception, a felony of the fourth degree. All counts are related to defendant’s receipt of workers’ compensation benefits received from the Ohio Bureau of Workers’ Compensation (“BWC”) between the period of November 19, 2002 through March 18, 2006.

{¶ 3} The matter proceeded to a bench trial. Tamara Wainwright, a claims representative at the BWC, testified concerning her involvement with defendant’s workers’ compensation claim and benefits. She verified various forms that were submitted in defendant’s claim. Exhibit 24 was the C-2 application signed by defendant seeking permanent and total disability (“PTD”) benefits and was dated September 7, 1993. Above her signature appears the following terms: “I further acknowledge that if the Industrial Commission grants my application for permanent and total disability and my disability later improves to the extent that I am able to return to a gainful employment, I shall immediately notify the Bureau of Workers’ Compensation, Columbus, Ohio * * *, of the date of return to work. I certify that the information on this and the preceding pages are true to the best of my knowledge.”

{¶ 4} Defendant was granted PTD on November 9, 1994, with the finding that “claimant cannot return to her former position of employment and has no rehabilitation potential.” (State’s Ex. 63.) Exhibit 23 contains the annual PTD contact letters sent to defendant for the purpose of making “sure that the injured worker, * * * that they’re not working and if they are, then they have to put the employer’s name down. If they have any questions, they can contact the [BWC].” The specific inquiry is, “Have you returned to work during the last year? If yes, when and where, return to work date and employer’s name.” To this, defendant responded “no.” By 2000, the PTD contact letter was altered such that the following options are included on the form: “full-time, part-time, volunteer.” Defendant did not check any of these options.

{¶ 5} Angel Bolbach was a special agent for the BWC, who participated in an investigation of defendant for alleged workers’ compensation fraud that began in June 2002. She went to the location of a bird store in North Royalton, where she obtained a business card from defendant. The card indicated that defendant and her husband owned the store. Bolbach returned to the store in July and again observed defendant going in and out of a backroom marked “employees only.” In December 2002, Bolbach called another bird store located in Willoughby, Ohio; defendant answered the phone and indicated that she worked at that location on Wednesday and Sunday. According to Bolbach, defendant was also a co-owner of the Willoughby bird store. In March 2003, Bolbach returned to the North Royalton store undercover and spoke with defendant, which

was videotaped. On this occasion, defendant assisted a customer with a sale. Later that month, Bolbach went to the North Royalton store with another agent and again recorded video of their interactions with defendant. Bolbach observed defendant assisting customers, having conversations, and using the register. Other than defendant's assistance to customers, she was not observed lifting items. When Bolbach was in the North Royalton bird store she did not observe any other employees present.

{¶ 6} On August 10, 2005, the BWC agents interviewed defendant and her husband simultaneously. Bolbach interviewed defendant's husband at the Willoughby store. Although he gave her information, he did not make either an oral or written statement.

{¶ 7} BWC Special Agent Jennifer Saunders testified that she was the agent in charge of investigating defendant for workers' compensation fraud. She assisted in an undercover visit to the North Royalton store in November 2002. Defendant approached her to see if she needed assistance. When Saunders alleged she was looking for a gift, defendant proceeded to help her.

{¶ 8} Saunders interviewed defendant on August 10, 2005 about her workers' compensation claim and her work activity. Defendant gave a statement, which was reduced to writing and signed by her, and entered into evidence as State's Exhibit 53. Defendant stated that she was responsible for opening and closing the business, as well as writing checks, placing orders, signing invoices, and occasionally waiting on customers. She indicated that her

“primary role is behind the scenes at the business” and that she did no physical work. Defendant further maintained that if she “had thought that she was working, [she] would have answered ‘yes’ on the PTD annual letters.”

{¶ 9} Phillip Brickman, another BWC special agent, testified about his involvement in the workers’ compensation fraud investigation of defendant. He participated in undercover operations at the North Royalton bird store. In December 2002, he entered the store and observed defendant behind the cash register speaking with customers and picking up a small bag of birdseed. He also observed another female behind the counter. Brickman spoke with defendant and documented it with audio and videotape.¹

{¶ 10} Michelle Mergen, a BWC Special Agent, also participated in undercover operations inside the North Royalton bird store. In March 2003, she went to the store alone and videotaped defendant, who appeared to be working by herself in the store. Defendant was working the cash register.

{¶ 11} Christopher Fender, another BWC special agent, testified that he conducted surveillance of the North Royalton bird store in November 2004. He performed two undercover operations in December 2004 and August 10, 2005. He also videotaped his surveillance and spoke with defendant. On the videotape, defendant is heard saying she is there more than she is at home and that she is there all of the time. In August, defendant was again observed

¹Due to “malfunctions,” only the audio portion of the tape recorded.

behind the cash register, along with two other females. Fender was present when defendant gave her statement on August 10, 2005.

{¶ 12} BWC Special Agent Shelly Peck assisted in an undercover operation at the Willoughby store in March 2003. Peck observed defendant in the store, walking around, talking to customers and moving “quite a bit.” Defendant spoke with Peck about birds and was very knowledgeable. Peck believes there might have been other employees present in the store. Defendant’s husband was “running the register and he also assisted.” Peck recorded her surveillance on videotape. Defendant said she was there every day. Approximately two weeks later, Peck participated in another undercover operation, which was recorded on videotape. She observed a delivery truck at the Willoughby store. Again she engaged in conversation about birds with defendant and observed defendant using the cash register. Peck observed defendant bending as she worked on displays.

{¶ 13} Richard Warren testified that he was a special agent assigned to investigate defendant for fraud based on several factors including age, date of injury, and last known doctor’s visit. Warren obtained information from the Ohio Secretary of State’s website that identified defendant as a party involved in the North Royalton bird store. Defendant signed as a witness for the business on the articles of organization, along with her husband. Undercover investigations of the business then commenced at the North Royalton location and then the Willoughby store. Warren conducted surveillance several times throughout the

investigation and documented it by videotape. Defendant was observed arriving at the business and unloading something from her vehicle at the North Royalton location.

{¶ 14} Warren later observed defendant at the Willoughby location. Defendant was also observed on another occasion opening the North Royalton store. She is seen carrying a bird cage. A trash pull was conducted from which Warren obtained names of various vendors that he contacted. Warren obtained invoices and other business records from the vendors that related to the bird stores. Some documents identified defendant as the contact. Defendant also signed an advertising agreement with another vendor. Defendant signed various other documents reflecting her association with the bird stores. On various other records, defendant is identified as a co-owner of the stores with her husband.

{¶ 15} The records of the North Royalton Chamber of Commerce identified defendant as an owner of the North Royalton bird store.

{¶ 16} Warren also identified numerous exhibits depicting the presence of defendant's car at the bird store on various occasions.

{¶ 17} Evidence was presented that established that defendant received payments from the BWC beginning December 11, 1987 until March 9, 2006.

{¶ 18} Renee Garapic is a fraud analyst for the BWC who calculated the overpayments made to defendant during periods she was believed to be working. She identified a warrant report for payments made to defendant for the period November 3, 2002 through July 23, 2005. At that time, defendant was receiving

approximately \$479.34 every two weeks from the BWC for PTD. Defendant also received additional money every two weeks during this period from the disabled workers relief fund (“DWRF”). Garapic’s calculations reflected that defendant was overpaid \$34,901.49 in PTD from November 11, 2002 to August 10, 2005. Her PTD benefits terminated on March 18, 2006, bringing the total overpayment calculation to \$42,732.23. Garapic then calculated the DWRF overpayments to be \$4,118.19 for the period between November 11, 2002 through March 18, 2006.

{¶ 19} The parties stipulated to tax records concerning the North Royalton bird store from the State of Ohio Department of Taxation.

{¶ 20} The State submitted its exhibits that were admitted without objection.

{¶ 21} The defendant moved for acquittal, which the trial court denied.

{¶ 22} Defendant then testified. She stated that she was deemed permanently disabled after suffering a back injury as an x-ray technologist. She maintained she has “a lot” of restrictions in her mobility. Her restrictions varied day-to-day, including difficulty driving a vehicle, getting dressed, turning, brushing her teeth, and other daily routines. Defendant said the bird stores started as a means of doing things together as a family. Raising birds was her hobby, the family raised birds as a hobby “and the store became an outlet for [them] to sell the birds. It gave [her] purpose.” Her husband purchased the bird business to give her something to do. Prior to that, people were coming to their house to purchase the birds “when it was a home-based business.” Defendant

acknowledged opening and closing the store on occasion, ordering products, signing for and overseeing deliveries. When the store was not busy, she would lay down on a pad and pillow in the back. She went to the store when she wanted to be there. She described it as “a family-oriented business.” She could operate the cash register but not the computers. Occasionally she would lift significant objects at the workplace. Defendant denies ever receiving any payment from the bird stores. But, she admits she was an owner of the store. She stated that the comments she made about being at the store all the time were untrue and she has no idea why she said it. Defendant did not “see what [she] was doing as being work.” At the time of trial, the North Royalton store was still in business and she and her husband still owned it. The store was up for sale and the Willoughby store closed in 2005.

{¶ 23} Defendant did not deny that on the videos she is the one making the sales, ringing the register, waiting on customers, moving product around, and answering the phones at the store. She did not deny that she ran the North Royalton store. She acknowledged saying multiple times that she was there every day.

{¶ 24} Defendant’s son testified next. He used to work at the North Royalton store and was there between 2002 and 2005. His mother was there and he observed her talking to customers. She could not lift much but occasionally did do heavy lifting. He was there almost every day and so was his mother.

{¶ 25} Jane Colleda, an occupational therapist, reviewed defendant's case. She reviewed the video surveillance of defendant and her medical records. She was compensated by the defense for her time. She acknowledged that defendant was on her feet throughout the video footage.

{¶ 26} Finally, defendant's husband testified. He owned the bird stores and also was employed as a machinist between 2002 and 2005. During this time period, defendant came and went as she pleased. She had no set time schedule. According to him, defendant could never do what was required to do the job by herself because she could not lift. The main reason for her being there was to "get out of the house." The main reason he bought the business was so that she could be with him.

{¶ 27} The trial court found defendant guilty of all counts. The court imposed a prison sentence of 15 months on Counts 1 and 3, to run concurrently with each other and consecutive to a 10-month sentence on Count 2. Defendant was ordered to pay restitution, investigative fees, and court costs. Defendant commenced this appeal, assigning three errors for our review.

{¶ 28} "I. The trial court erred in denying appellant's motion for acquittal pursuant to Criminal Rule 29 where there was insufficient evidence."

{¶ 29} When reviewing sufficiency of the evidence, an appellate court must determine "[w]hether, 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, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 30} Defendant was charged with two counts of workers’ compensation fraud in violation of R.C. 2913.48(A)(1) and/or (A)(2), which provide:

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

{¶ 32} “(1) Receive workers’ compensation benefits to which the person is not entitled;

{¶ 33} “(2) Make or present or cause to be made or presented a false or misleading statement with the purpose to secure payment for goods or services rendered under Chapter 4121., 4123., 4127., or 4131. of the Revised Code or to secure workers’ compensation benefits[.]”

{¶ 34} Defendant was also charged with one count of theft in violation of R.C. 2913.02(A)(3), which provides:

{¶ 35} “(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

{¶ 36} “* * *

{¶ 37} “(3) By deception[.]”

{¶ 38} “A trier of fact must convict a defendant of workers’ compensation fraud if the State proves beyond a reasonable doubt that the defendant, ‘with purpose to defraud * * * (1) [r]eceive[d] workers’ compensation benefits to which

[she][was] not entitled; [or] (2) [made] * * * a false or misleading statement with the purpose * * * to secure workers' compensation benefits.' R.C. 2913.48(A)(1) and (2). 'Defraud' means 'to knowingly obtain, by deception, some benefit for oneself or another, or to knowingly cause, by deception, some detriment to another.' R.C. 2913.01(B)." *State v. Dillon*, Franklin App. No. 05AP-679, 2006-Ohio-3312, ¶20.²

{¶ 39} "A defendant commits 'deception' when he: 'knowingly deceiv[es] another or caus[es] another to be deceived by any false or misleading representation, by withholding information, by preventing another from acquiring information, or by any other conduct, act, or omission that creates, confirms, or perpetuates a false impression in another, including a false impression as to law, value, state of mind, or other objective or subjective fact.'" *Id.*, quoting R.C. 2913.01(A).

{¶ 40} In *Dillon*, the injured worker claimed he did not know that his real estate employment rendered him ineligible for workers' compensation benefits. The court held otherwise based on the following reasons: "Not only did Carman send Dillon two letters informing him that he was not entitled to TTD benefits if he returned to any type of work, but additionally, the warrants Dillon signed warned him that he could not work and receive TTD or LM benefits. Further, even if

²Both parties cite to case law pertaining to whether an injured worker or claimant is entitled to PTD benefits. However, neither case concerns allegations of workers' compensation fraud. See *State ex rel. Lawson v. Mondie Forge*, 104 Ohio St.3d 39, 2004-Ohio-6086 and *State ex rel. Schultz v. Indus. Comm.*, 96 Ohio St.3d 27,

Dillon was confused by or ignored the letters and warrants, Evans, Woeste's sales manager, told Dillon that he did not believe Dillon could receive benefits while working as a real estate agent for Woeste. Accordingly, we conclude that the State offered evidence sufficient to convince a rational trier of fact that Dillon knew he was ineligible for the benefits he received, and thus, he purposefully defrauded the BWC."

{¶ 41} Like *Dillon*, defendant claims she did not consider her activities at the bird store to be work. However, evidence was submitted where she claimed to be at the North Royalton store everyday, except when she was at the Willoughby store. The tapes show her waiting on customers, lifting objects, bending and moving about, and operating the cash register. She admitted placing orders and overseeing deliveries, which is confirmed by other evidence received from vendors. In addition, she entered an advertising agreement for the store. While she was not paid a salary or wage, all the evidence and her own testimony establishes that she owned the store, which was a family business. Defendant admits signing PTD contact letters and indicating that she had not worked during the times she was present at the store. She received and cashed all of the BWC payments. She also acknowledged on BWC documents as follows: "I further acknowledge that if the Industrial Commission grants my application for permanent and total disability and my disability later improves to the extent that I

am able to return to a gainful employment, I shall immediately notify the Bureau of Workers' Compensation, Columbus, Ohio * * *, of the date of return to work. I certify that the information on this and the preceding pages are true to the best of my knowledge." Despite these warnings, defendant proceeded to engage in clerking activities on a regular basis throughout the BWC investigation of her at the family business from 2002 to 2005. Defendant testified that, prior to that time, she had been selling birds out of her home. There was sufficient evidence to establish the charges against her when the evidence is construed in a light most favorable to the State.

{¶ 42} Assignment of Error I is overruled.

{¶ 43} "II. Appellant's convictions are against the manifest weight of the evidence.

{¶ 44} To warrant reversal from a verdict under a manifest weight of the evidence claim, this Court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

{¶ 45} In this bench trial, the court was the finder of fact and found the defendant guilty on all charges. Again, defendant maintains her belief that she was not working as justification for her continued receipt of BWC benefits during

periods she was at the stores performing work activities. Although defendant was not paid a wage, she was an owner of the family business. She referred to her role as being “behind the scenes,” admitted to opening and closing the store, doing clerical work, signing invoices, and waiting on customers. Although defendant minimized her activities and insisted she was severely limited in her mobility at these times, the videotapes and evidence could lead a factfinder to a different conclusion. See, generally, *Dillon*, supra; *State v. Hall*, Montgomery App. No. CIV.A. 19074, 2003-Ohio-2824 (upholding conviction for workers’ compensation fraud where evidence was presented that defendant worked on vehicles in a warehouse, made repairs to cars, placed advertisements for sale of cars, and wrote checks for auto-related purchases during periods when he was receiving workers’ compensation benefits). We cannot say that the trial court clearly lost its way in assessing the credibility of the witnesses and weighing the evidence in reaching its convictions.

{¶ 46} Assignment of Error II is overruled.

{¶ 47} “III. The trial court erred in failing to vacate count two, workers’ compensation fraud, and count three, theft by deception, as allied offenses of similar import.”

{¶ 48} Here, defendant argues that her conviction for theft by deception is an allied offense to Counts 1 and 2 and should therefore be vacated.

{¶ 49} It is undisputed that Counts 1, 2, and 3 arise from the same nucleus of facts and were committed with a single animus. Accordingly, the State

recognizes that while defendant could be properly charged with both theft by deception and workers' compensation fraud, the convictions must merge such that she can only be sentenced for one offense. See R.C. 2941.25.

{¶ 50} In *State v. Brown*, 119 Ohio St.3d 447, ¶42-43, 2008-Ohio-4569, the court held that “the proper disposition of matters involving allied offenses of similar import committed with a single animus is to merge the crimes into a single conviction. * * * Thus, upon remand for merger and resentencing the State must elect which of [defendant's] two assault charges will merge into the other for purposes of * * * conviction and sentence.”

{¶ 51} The Ohio Supreme Court has recently reiterated, where an accused has been convicted of allied offenses of similar import “the choice is given to the prosecution to pursue one offense or the other, and it is plainly the intent of the General Assembly that the election may be of either offense.” *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, 911 N.E.2d 882, ¶21.

{¶ 52} Accordingly, we sustain this assignment of error in part and overrule it in part. Defendant's convictions for workers compensation fraud (Counts 1 and 2) and theft by deception under Count 3 are allied offenses of similar import and must be merged into one conviction, as determined by the State on remand.

{¶ 53} Judgment affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share equally the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Case remanded to the trial court for further proceedings.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, JUDGE

SEAN C. GALLAGHER, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR