[Cite as *State v. Ivy*, 2010-Ohio-2599.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93117

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOHN H. IVY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-491340

BEFORE: Blackmon, J., Rocco, P.J., and Stewart, J.

RELEASED: June 10, 2010

JOURNALIZED:

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PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant John Ivy ("John")[1] appeals his convictions for forgery and receiving stolen property. John assigns the following errors for our review:

> **"I. Defendant's convictions for forgery and receiving stolen property were against the manifest weight of the evidence."**
>
> **"II. The accused's convictions for forgery and receiving stolen property were not supported by sufficient evidence as required by due process in violation of U.S. Constitution Amendment XIV and Crim.R. 29."**
>
> **"III. The court erred in ordering Mr. Ivy to pay restitution to Kenneth Oneal[2] in violation of U.S. Constitutions V and XIV, Ohio Constitution Article 1, Section 10a, R.C. 2929.11, and 2929.18 because Mr. Oneal was not the victim of the crimes charged."**

{¶ 2} Having reviewed the record and pertinent law, we affirm John's convictions. The apposite facts follow.

{¶ 3} On January 31, 2009, John was one of several people charged in a multi-count indictment involving a mortgage fraud scheme. The indictment alleged, inter alia, that the defendants engaged in theft by deception, securing writings by deception, forgery, uttering, fraud, telecommunication fraud,

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[1]We will refer to John Ivy as "John" because he shares a surname with other codefendants.

[2]The record reveals four different spellings of defendant Kenneth Oneal's name. For

falsification, and receiving stolen property. For his part, the indictment charged John with two counts of forging identification cards, one count of receiving stolen property, and one count of falsification relating to a real estate transaction for a house located in Oakwood Village, Ohio.

{¶ 4} In a trial, which began on February 18, 2009, John's case was tried to a jury with codefendants, Carolyn Ivy (John's wife), Lavon Ivy (John's daughter), PTOT Enterprises, M&S Investment Services, Inc., and Phillip Stevens. Prior to trial, Kenneth Oneal, the purchaser of the subject property, and Eugene Jones, the seller, both pleaded guilty to misdemeanors and were sentenced to probation. In addition, prior to trial, the state dismissed the falsification count against John.

{¶ 5} The facts at trial had very little to do with John. Essentially, the facts presented established that in April 2004, Jones listed his deceased mother's home for sale. Thereafter, Oakwood Village conducted a point of sale inspection and presented Jones with a list of violations, which needed to be corrected prior to the sale. Jones opted to sell the property in an "as is" condition, which allows a buyer to cure the violations before the city will grant an occupancy permit.

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purposes of this opinion, we will use "Oneal."

{¶ 6} In August 2004, Oneal approached Jones and offered $90,000 for the property and agreed to assume the violations. Jones contacted Lavon Ivy, who was a real estate appraiser, realtor, loan officer for a mortgage company, and president of PTOT Enterprises, a construction company owned by her parents. Lavon Ivy prepared the purchase agreement reflecting the $90,000 contract price, which both Oneal and Jones subsequently signed.

{¶ 7} Thereafter, a loan package was submitted to New Century Mortgage Company. The package included a loan application signed by Oneal, a copy of the purchase agreement purportedly signed by the buyer and seller reflecting a purchase price of $165,000 instead of $90,000, a copy of a cashier's check, drawn on National City Bank, in the amount of $42,000 representing the down payment, copy of an appraisal performed by Lavon Ivy, reflecting a $165,000 property value for the house, and a copy of the settlement statement reflecting $132,000 as the amount financed.

{¶ 8} Based on the submission of the above documents, New Century approved the loan for $132,000. On October 29, 2004, the loan closed, was funded, and the property transferred from Jones to Oneal.

{¶ 9} At trial, Oneal testified that Lavon Ivy was responsible for arranging the necessary financing to purchase the house and the financing would be enough to cover the violations. In addition, the financing would be

structured so that he would not need to make a down payment. Oneal testified that in order to facilitate the financing, he signed three letters prepared by Lavon Ivy regarding his credit derogatoriness, credit inquiries, and one representing that he had a monthly income of $5,287.

{¶ 10} Oneal further testified that the letter regarding his income was false, because he only made $1,800 per month. In regard to the cashier's check purporting to be the down payment, Oneal stated that he never had a National City Bank account containing $42,000, and he did not pay any money to Jones.

{¶ 11} At trial, Pamela Kessler of National City Bank testified that the purported cashiers check for $42,000 was not a National City Bank document. Kessler further stated the document did not conform to any cashier's check that would have been issued by National City Bank.

{¶ 12} Deirdre Ferguson testified that she was the president of Beachwood Title at the time the transaction was completed. Ferguson stated that she handled the closing of the loan, which required both Jones and Oneal to appear in her office to sign the necessary documents. Jones and Oneal appeared at different times.

{¶ 13} When Jones came into Ferguson's office, she went over the settlement statement with him including a payout of $25,581.48 to PTOT

Enterprises for work done on the subject property. Ferguson stated that she had an invoice on file from PTOT Enterprises reflecting that the work had been completed. Ferguson testified that Jones signed the settlement statement, which authorized her to disburse the funds to PTOT Enterprises.

{¶ 14} Ferguson testified that Oneal and his wife also came into her office, presented identification, and signed the necessary documents to complete the transaction.

{¶ 15} Jones testified that it was at the closing that he learned for the first time that the purchase price was stated as $165,000. He stated that when he inquired of Lavon Ivy about the discrepancy, she indicated the purchase agreement was written in that manner in order to procure the necessary financing.

{¶ 16} Jones also testified that although the settlement statement indicated that PTOT Enterprises was to be paid $25,281.48 for rehabilitation work, he had never heard of them and had not authorized them to do any work because he was selling the house "as is." Jones testified that he had never seen the invoice and did not sign the invoice. Jones testified that he signed the settlement documents at closing because the net proceeds from the sale were close to the amount he thought he would receive for the sale of the house.

{¶ 17} After the loan's closing and transfer of the property, John began working on the subject property. The evidence established that John began working on the house without the proper permits and without initially being registered as a contractor with Oakwood Village. The evidence also established that on a given night, Oneal's wife, Kathleen, found John and his crew working on the property at approximately 10:00 p.m., asked them to leave, and subsequently changed the locks.

{¶ 18} On February 27, 2009, the jury found John guilty of all three charges. On March 26, 2009, the trial court sentenced John to five years of community controlled sanctions and ordered him to pay restitution in the amount of $21,081.48 to Oneal in monthly installments of $100.

Manifest Weight of Evidence

{¶ 19} In the first assigned error, John argues his convictions are against the manifest weight of the evidence. We disagree.

{¶ 20} In *State v. Wilson,* 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, the Ohio Supreme Court addressed the standard of review for a criminal manifest weight challenge, as follows:

> **"The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. Id. at 386, 678 N.E.2d 541. The court held that**

> **sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. Id. at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive — the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. Id. at 387, 678 N.E.2d 541. 'When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony.' Id. at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652."**

{¶ 21} At trial, the testimony established that Jones contracted to sell the subject property "as is" for $90,000 and Oneal would assume the violations. However, Ferguson testified that she disbursed the sum of $25,581.48 to PTOT Enterprises because she had an invoice that indicated that work had been completed on the property. Ferguson also testified that Jones, the seller, signed the settlement documents authorizing the title company to disburse said funds to John.

{¶ 22} However, Jones testified that he had never heard of PTOT Enterprises until the day he appeared for the closing of the loan and that he had not authorized them to do any work on a property that he was selling "as is." Jones further testified that he did not sign the invoice PTOT Enterprises submitted for allegedly completing work on the property. Jones finally testified that despite

the discrepancies, he signed the settlement documents because the net proceeds were close to what he expected for selling the house.

{¶ 23} Further, the record before this court includes state's Exhibit No. 3, the invoice submitted purporting that $25,581.48 in rehabilitation work had been completed on the subject property. The invoice bears John's signature and the purported signature of Jones. The record indicates that the invoice was faxed on October 28, 2004, the day before the loan closed, from codefendant M&S Investments.

{¶ 24} By preparing, signing, and submitting the invoice containing the purported signature of Jones, John falsely attested that the work was already completed and that he was owed $25,581.48. As such, John fraudulently obtained the money released to his company. Moreover, the evidence established that it was not until after the loan closed that John attempted to do the work on the subject property.

{¶ 25} The determination of weight and credibility of the evidence is for the trier of fact. *State v. Chandler*, 10th Dist. No. 05AP-415, 2006-Ohio-2070, citing *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212. The rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimonies are credible. *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503.

{¶ 26} Further, the trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Sheppard* (Oct. 12, 2001), 1st Dist. No. C-000553. Consequently, although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must give great deference to the factfinder's determination of the witnesses' credibility. *State v. Covington*, 10th Dist. No. 02AP-245, 2002-Ohio-7037, at ¶22; *State v. Hairston*, 10th Dist. No. 01AP-1393, 2002-Ohio-4491, at ¶17.

{¶ 27} Thus, John's convictions for forgery and receiving stolen property are not against the manifest weight of the evidence. Accordingly, we overrule the first assigned error.

Sufficiency of the Evidence

{¶ 28} In the second assigned error, John argues the state failed to provide sufficient evidence to support his conviction. We disagree.

{¶ 29} The sufficiency of the evidence standard of review is set forth in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus. *Bridgeman* must be interpreted in light of the sufficiency test outlined in *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, in which the Ohio Supreme Court held:

> **"An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction**

is to examine the evidence submitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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. (*Jackson v. Virginia* [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)"

{¶ 30} In the instant case, the jury found John guilty of two counts of forgery in violation of R.C. 2913.31, which provides in pertinent part as follows:

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

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

"(2) Forge any writing so that it purports to be genuine when it actually is spurious, or to be the act of another who did not authorize that act, or to have been executed at a time or place or with terms different from what in fact was the case, or to be a copy of an original when no such original existed;

"(3) Utter, or possess with purpose to utter, any writing that the person knows to have been forged."

{¶ 31} As discussed in the first assigned error, an invoice bearing John's signature and the purported signature of Jones was submitted to the title company indicating that PTOT Enterprises had completed work on the subject property and was owed $25,581.48. Jones testified that he did not contract with PTOT Enterprises to do any rehabilitation work on a property that he was selling "as is" and testified that he did not sign the invoice. As such, John's active involvement in submitting the fraudulent invoice bearing the purported signature of Jones facilitated the crime of forgery.

{¶ 32} The jury also found John guilty of receiving stolen property in violation of R.C. 2913.51(A), which provides that "[n]o person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense."

{¶ 33} Here, the evidence established that PTOT Enterprises received $25,581.48 from the mortgage company by submitting an invoice falsely indicating that work had been completed on the subject property. As such, John fraudulently obtained the money from the mortgage company without rendering any service. Thus, the state presented sufficient evidence that John received stolen property. Accordingly, we overrule the second assigned error.

Restitution

{¶ 34} In the third assigned error, John argues the trial court erred in ordering him to pay restitution to Oneal. We disagree.

{¶ 35} As part of a felony sentence, a court may order restitution to a victim based on the victim's economic loss. *State v. Buckeye Truck and Trailer Leasing, Inc.*, 6th Dist. Nos. WD-09-052 and WD-09-053, 2010-Ohio-1699. In the instant case, despite Oneal's complicity in the fraudulent scheme and that he pled guilty to falsifying loan documents, he was ultimately responsible for the mortgage loan. This loan included the $25,581.48 that PTOT Enterprises fraudulently obtained by submitting an invoice for work that had not been completed.

{¶ 36} The record indicates that John had only done approximately $4,500 of work after the transaction was completed and he was denied further access to the subject property. As such, John owes Oneal the balance of the funds disbursed to PTOT Enterprises because the full value of the work was not completed. Consequently, the trial court correctly ordered restitution to Oneal. Accordingly, we overrule the third assigned error.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. Case remanded to the trial court for execution of sentence.

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

PATRICIA ANN BLACKMON, JUDGE

KENNETH A. ROCCO, P.J., and
MELODY J. STEWART, J., CONCUR