

[Cite as *State v. Gay*, 2015-Ohio-524.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101345

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL GAY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-579029-A

BEFORE: E.T. Gallagher, J., S. Gallagher, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: February 12, 2015

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EILEEN T. GALLAGHER, J.:

{¶1} Defendant-appellant, Michael Gay (“Gay”), appeals his convictions for receiving stolen property, misuse of credit cards, and petty theft. Finding no merit to the appeal, we affirm.

{¶2} On October 23, 2013, Gay was indicted on nine counts: three counts of receiving stolen property in violation of R.C. 2913.51(A), three counts of misuse of credit cards in violation of R.C. 2913.21(B)(2), and three counts of petty theft in violation of R.C. 2913.02(A)(3).

{¶3} The charges against Gay arose after three separate out-of-state victims discovered fraudulent charges on their credit cards, charges made in stores located in Ohio. One of the victims, Ms. Cynthia Ann Robles (“Robles”), filed a police report in Texas. The report was forwarded to detectives of the Beachwood Police Department, since several transactions occurred in the surrounding area. An investigation by the detectives linked the fraudulent charges to reward and loyalty cards. The reward and loyalty cards were used simultaneously with the victims’ credit cards. Detectives were able to track through the reward and loyalty cards that they were registered in Gay’s name. Gay was then identified on security video making purchases at the stores in question, on the dates and times matching the fraudulent charges.

{¶4} Prior to trial, the trial court granted the state’s unopposed motion to allow the three out-of-state victims to testify via teleconference. The case proceeded to a jury trial, where all three victims testified via teleconference, using the computer program Skype. The jury found Gay guilty of all nine counts. Gay was later sentenced to an aggregate three-year prison term.

{¶5} Gay now appeals, raising two assignments of error.

Right to Confrontation

{¶6} In his first assignment of error, Gay argues the use of teleconferencing to present witness testimony violated his right to confrontation and his right to due process.

{¶7} The Sixth Amendment to the United States Constitution provides, “[i]n all criminal prosecutions the accused shall enjoy the right * * * to be confronted with the witnesses against him.” The Ohio Constitution, Article I, Section 10 provides that:

[T]he party accused shall be allowed * * * to meet the witnesses face to face * * *; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance cannot be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court.

{¶8} However, in *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990), the United States Supreme Court held that while “the Confrontation Clause reflects a preference for face-to-face confrontation at trial,” that “preference must occasionally give way to considerations of public policy and the necessities of the case.” *Id.* at 849. In holding that the right to confrontation is not absolute, the court detailed a number of important reasons for that right, including (1) the giving of testimony under oath, (2) the opportunity for cross-examination, (3) the ability of the factfinder to observe demeanor evidence, and (4) the reduced risk that a witness will wrongfully implicate an innocent defendant. *Id.* at 845-846. The court found, “the central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.” *Id.*

{¶9} In determining whether the admission of testimony via teleconference at trial violated the defendant’s right of confrontation, this court, in *State v. Marcinick*, 8th Dist. Cuyahoga No. 89736, 2008-Ohio-3553, utilized the two-part analysis from *Craig* and held:

To qualify as an exception, the procedure must (1) be justified, on a case-specific finding, based on important state interests, public policies, or necessities of the case and (2) must satisfy the other three elements of confrontation — oath, cross-examination, and observation of the witness's demeanor.

Marcinick at ¶ 18, citing *Harrell v. State*, 709 So.2d 1364, 1369 (Fla.App.1998), citing *Craig* at 849-851. In *Marcinick*, this court found that the teleconferencing testimony of an out-of-country witness did not violate the defendant's right to confrontation when, in that case, these two elements were satisfied.

{¶10} Applying this analysis, we find that under the specific facts of this case, allowing the three out-of-state victims to testify at trial via teleconferencing did not violate Gay's right of confrontation. The state demonstrated the unavailability of the witnesses and the admissibility of the testimony itself. The state's motion to allow witness testimony via teleconference, filed January 1, 2014, was unopposed. Moreover, Gay did not object at trial to the out-of-state witnesses testifying via teleconference.

{¶11} Whereas two of the victims testified under oath, Gay points out that Robles was not sworn in prior to her testimony, as required by Evid.R. 603:

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

However, defense counsel waived the oath requirement in open court and on the record with Gay's approval. (Tr. 235.) Furthermore, all three victims that testified via teleconference were subject to cross-examination and were observed by both the defendant and the jury throughout their testimony. Gay argues his rights were violated because one of the victims admitted during

his testimony that his wife was sitting beside him. However, Gay does not provide any case law to support his contention.

{¶12} Finally, Gay’s reference to the instances of “Skypebombing”¹ in a recent criminal case in Florida, is inapplicable here, where no evidence of “Skypebombing” exists in the record.

{¶13} Accordingly, Gay’s first assignment of error is overruled.

Evidence at Trial

{¶14} In his second assignment of error, Gay argues his due process rights were violated by the use of “confusing” and “cumulative” evidence by the state. Gay argues the state’s use of 83 exhibits at trial was “repetitive, redundant, generally not relevant, and [was] confusing to the jury[.]” Gay argues the evidence was difficult for the jury to “sort out.”

{¶15} The admission or exclusion of evidence is within the broad discretion of the trial court. *State v. Allen*, 73 Ohio St.3d 626, 633, 653 N.E.2d 675 (1995). The trial court’s ruling will not be reversed on appeal absent a clear abuse of discretion that materially prejudiced the party. *State v. Kniep*, 87 Ohio App.3d 681, 685, 622 N.E.2d 1138 (9th Dist.1993), citing *State v. Hymore*, 9 Ohio St.2d 122, 128, 224 N.E.2d 126 (1967). We will not substitute our judgment for that of the trial court, but we will defer to a judgment that is reasonable under the circumstances of the case. *Berk v. Matthews*, 53 Ohio St.3d 161, 169, 559 N.E.2d 1301 (1990).

{¶16} Having reviewed the evidence admitted at trial, we find the exhibits are neither confusing nor redundant. The state included the video surveillance footage for each fraudulent charge contained in the indictment, as well as still photos of each video. In addition, the state presented credit card billing statements containing the fraudulent charges from each victim, as

¹ The act of having other Skype users attempt to “call” the Skype account of the testifying witness during their testimony. This occurred in a recent Florida case when the case was televised. His testimony was interrupted by the multitude of call requests appearing on the screen.

well as receipts that corresponded to the fraudulent purchases. Furthermore, we note that defense counsel did not object to any of the state's exhibits, except for state's exhibit No. 75, and thus has waived all but plain error.

{¶17} State's exhibit No. 75, the affidavit of fraud and forgery of victim Mr. Dickie Hill ("Hill"), prepared by his credit card company, listed the fraudulent charges made using Hill's credit card. Defense counsel objected to its admission, arguing that the affidavit was hearsay because it was prepared by someone who did not come to court. The court admitted the affidavit over defense counsel's objection, stating that although it was prepared by someone else, Hill adopted it as the affiant when he signed it. (Tr. 230-231.) We find no error.

{¶18} We find that Gay was not materially prejudiced, and the trial court did not abuse its discretion in admitting the state's 83 exhibits. Accordingly, Gay's second assignment of error is overruled.

{¶19} Judgment affirmed.

It is ordered that appellee recover from appellant 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 common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. 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.

EILEEN T. GALLAGHER, JUDGE

SEAN C. GALLAGHER, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR