

[Cite as *State v. Lenard*, 2017-Ohio-4074.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104986

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RICHARD MARCUS LENARD

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-597800-A

BEFORE: E.T. Gallagher, J., Kilbane, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: June 1, 2017

ATTORNEY FOR APPELLANT

David L. Doughten
David L. Doughten Co., L.P.A.
4403 St. Clair Avenue
Cleveland, Ohio 44103

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor

BY: Jonathan Block
Assistant Prosecuting Attorney
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

EILEEN T. GALLAGHER, J.:

{¶1} Defendant-appellant, Richard Lenard (“Lenard”), appeals his theft and tampering with records convictions. He raises two assignments of error:

1. The trial court erred by allowing the state to amend Count 1 of the indictment, theft, R.C. 2913.02(A)(3), after the close of the state’s case.
2. The evidence is insufficient to sustain a conviction of tampering with records in violation of R.C. 2913.42.

{¶2} There is no merit to the appeal, and the trial court’s judgment is affirmed.

I. Facts and Procedural History

{¶3} Lenard was charged with one count of grand theft, in violation of R.C. 2913.02(A)(3), and one count of tampering with records, in violation of R.C. 2913.42(A)(1). Count 1 alleged that Lenard stole property from Steven Mladenovic (“Mladenovic”) valued at \$7,500 or more, but less than \$150,000. Count 2 alleged that Lenard perpetrated a fraud on Shirley Kummerlen (“Kummerlen”) and/or Fifth Third Bank (“Fifth Third”) by falsifying a quit claim deed purportedly transferring Kummerlen’s house to Fifth Third.

{¶4} In January 2014, Kummerlen moved to an apartment and subsequently listed her North Royalton, Ohio home (“the property”) for sale on Craigslist. She had been trying to sell the property, which was in foreclosure, for approximately one year when she met a man, who introduced himself as Richard Kelly, in the lobby of her apartment building. The man, later identified as Lenard, represented to Kummerlen that he could

expedite the sale of her property. (Tr. 231.) He explained that Fifth Third had accepted his offer to purchase the home and that the sale of her house would release her from her mortgage at Fifth Third. (Tr. 230-231.)

{¶5} Lenard showed Kummerlen several official-looking documents. One document indicated that Fifth Third was attempting to collect a debt from Kummerlen. Among other things, the document stated that “Fifth Third Bank has agreed to enter into a deed in lieu of foreclosure for the * * * property.” It also stated: “At the conclusion of the executed approved deed in lieu of foreclosure, Fifth Third will absolve the reported mortgage debt from above mentioned credit file.”

{¶6} A second document was a letter signed by Richard Kelly. The letter, which was admitted into evidence, states, in relevant part:

My name is Richard Kelly of Investech Mortgage Securities. My company was contacted by Fifth Third, whom is your mortgage holder [sic] in an effort to resolve your foreclosed home located at 11288 Drake Road, North Royalton, Ohio 44133. I will be your contact and I would like the opportunity to work with you.

Fifth Third is extending an [sic] limited offer of “cash for deeds” program. Due to your recent foreclosure, I can get you a check ranging from \$1,000 to \$2,000 in exchange for the deed to the property, it is that simple. This program allows the foreclosure process to be eliminated and the foreclosure will be dissolved off your credit report due the agreement between yourself and the Bank. It’s a win/win situation for all parties.

This program has been very successful. I will arrange all the paperwork needed for this transaction and I can have the deal completed in about a week with your assistance. However, this is a limited time offer due to the foreclosure already filed in Cuyahoga County case number CV-15-840946. I will need your cooperation by June 22, 2015 in order to process your check on time. By working with me, you may be able to come out ahead and have funds to move forward in any future endeavors you choose. Please don’t let this opportunity pass you by. Time is of the essence.

Sincerely,
Richard Kelly
Investech Mortgage Securities, Inc.

Lenard offered Kummerlen \$2,000 if she agreed to execute the quit claim deed.

{¶7} Kummerlen was initially hesitant, but the paperwork looked official. After discussing the proposal for approximately one hour, she accepted Lenard's offer. Lenard indicated he would return with a check in the amount of \$2,000, the quit claim deed, and a notary to complete the transaction. After he left, Kummerlen consulted her realtor, who advised her to accept the offer. When Lenard later returned, Kummerlen accepted Lenard's check for \$2,000 and executed the quit claim deed. At Lenard's request, Kummerlen gave Lenard the code to the realtor lock box on the property. Kummerlen subsequently went out of town on a previously scheduled trip.

{¶8} Upon Kummerlen's return, she learned that the deal she made with Lenard was a scam. The realtor had contacted Fifth Third to investigate Lenard's proposal, and Fifth Third informed him that the bank had no knowledge of Lenard's offer to purchase Kummerlen's home. Fortunately, the scam was discovered quickly, and the transaction was stopped before the deed was recorded. Kummerlen remained the legal owner of the property and kept the \$2,000 she received from Lenard.

{¶9} Meanwhile, Lenard listed the property for sale on Craigslist and indicated that interested persons should contact "Ryan Smith." Mladenovic responded to the listing and met with Ryan Smith, who was later identified as Lenard. Lenard showed Mladenovic the home, and the parties agreed on a sale price of \$78,000. Lenard

produced a purchase agreement, and Mladenovic gave Lenard a check in the amount of \$8,000 as a down payment on the property. Mladenovic made the check payable to General Title Services, which Lenard represented was his company's business name. Mladenovic drew the check on his own company's account, RCS Greater Cleveland L.L.C. ("RCS"). Lenard cashed the \$8,000 within two days.

{¶10} Three weeks later, Mladenovic appeared at a Fifth Third branch in Westlake, Ohio, with a check for \$70,000 to complete the purchase of his new home. Lenard was not present. An agent of the bank presented Mladenovic a contract signed by a Vice President accepting an offer of \$60,000 instead of either the \$78,000 Mladenovic and Ryan Smith had agreed upon, or the \$70,000 balance of the agreed sale price after deducting the \$8,000 down payment. Mladenovic did not sign the closing documents, and the closing of the sale was rescheduled to a later date to allow Lenard to appear. In the meantime, Mladenovic called the North Royalton police.

{¶11} Detective David Sword ("Sword"), of the North Royalton Police Department, collected documents from both Kummerlen and Mladenovic and forwarded them to Fifth Third fraud investigators. Sword was unable to locate any company in Ohio doing business as "General Title Services," nor could Sword find anyone named "Ryan Smith," who fit the descriptions given by the victims. Nevertheless, Mladenovic and Kummerlen separately and independently identified Lenard from a photo array. Mladenovic indicated he was 99 percent certain that the person he identified in the lineup introduced himself as "Ryan Smith." Kummerlen also identified Lenard from a photo

array, with 80 percent certainty. However, she indicated that a second individual in the lineup could also be the man who introduced himself as “Richard Kelly.”

{¶12} A witness from Fifth Third testified at trial that the bank does not have a “cash for deeds” program, and that the bank has never done business with Ryan Smith, Richard Kelly, or Richard Lenard.

{¶13} The jury found Lenard guilty on both counts. The trial court sentenced him to 16 months in prison on Count 1, theft, and six months in prison on Count 2, Tampering with Records, and ordered the sentences be served concurrently. The court also imposed three years of postrelease control. Lenard now appeals his convictions.

II. Law and Analysis

A. Amending the Indictment

{¶14} In the first assignment of error, Lenard argues the trial court erred in allowing the state to amend the indictment after the close of the state’s case-in-chief. He contends that by allowing the state to amend the indictment to add Mladenovic’s company, RCS, as a second victim, the court violated his constitutional right to a grand jury indictment.

{¶15} Article I, Section 10 of the Ohio Constitution states that “no person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury.” In *State v. Headley*, 6 Ohio St.3d 475, 478-79, 453 N.E.2d 716 (1983), the Ohio Supreme Court explained that this provision

guarantees the accused that the essential facts constituting the offense for which he is tried will be found in the indictment of the grand jury. Where

one of the vital elements identifying the crime is omitted from the indictment, it is defective and cannot be cured by the court as such a procedure would permit the court to convict the accused on a charge essentially different from that found by the grand jury.

Thus, the Ohio Constitution guarantees that the essential facts constituting the offense for which an accused is tried will be found in the grand jury indictment. *State v. Pepka*, 125 Ohio St.3d 124, 2010-Ohio-1045, 926 N.E.2d 611, ¶ 14, citing *Harris v. State*, 125 Ohio St. 257, 264, 181 N.E. 104 (1932).

{¶16} The state may nevertheless amend an indictment, even if the original indictment omits an essential element of the offense with which the defendant is charged, as long as the state complies with Crim.R. 7(D). *State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4527, 903 N.E.2d 609, ¶ 1, citing *State v. O'Brien*, 30 Ohio St.3d 122, 127-128, 508 N.E.2d 144 (1987).

{¶17} Crim.R. 7(D) provides, in relevant part:

The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged.

If an amendment changes the penalty or degree of the charged offense, it changes the identity of the offense and is not permitted by Crim.R. 7(D). *Pepka*, at ¶15, citing *Davis* at ¶ 1. This rule ensures that a criminal defendant will not be “surprised” by a new charge. *See In re Reed*, 147 Ohio App.3d 182, 2002-Ohio-43, 769 N.E.2d 412, ¶ 33 (8th Dist.).

{¶18} We review a trial court’s decision to permit the amendment of an indictment for an abuse of discretion and a showing of prejudice to the defense. *State v. Moore*, 8th Dist. Cuyahoga No. 103123, 2016-Ohio-2836, ¶ 29. Abuse of discretion implies that the court’s attitude was unreasonable, arbitrary, and unconscionable. *State v. Phillips*, 8th Dist. Cuyahoga No. 104806, 2017-Ohio-1284, ¶ 26. To establish prejudice, the defendant must show that but for the defect in the proceedings, the outcome would have been different. *State v. Cox*, 8th Dist. Cuyahoga No. 102629, 2016-Ohio-20, ¶ 8; *State v. Almazan*, 8th Dist. Cuyahoga No. 103563, 2016-Ohio-5408, ¶ 67.

{¶19} Lenard argues the addition of RCS as a named victim violated his right to a grand jury indictment. However, courts have held that an amendment to identify the name of a victim does not change the identity of the offense. *See, e.g., State v. Phillips*, 75 Ohio App.3d 785, 600 N.E.2d 825 (2d Dist.1991), citing *State v. White*, 2d Dist. Greene No. 85 CA 38, 1986 Ohio App.LEXIS 6467 (Apr. 17, 1986); *State v. Owens*, 51 Ohio App.2d 132, 149, 366 N.E.2d 1367 (9th Dist.1975) (“An amendment to an indictment which changes the name of the victim changes neither the name nor the identity of the crime charged.”).

{¶20} Adding RCS as a second victim did not change the identity or degree of the theft offense and did not prejudice Lenard’s defense. Lenard could not be surprised by the amendment since the check he cashed in order to perpetrate the theft offense was drawn on RCS’s checking account. Although adding the name of a new victim may be different from merely changing or identifying the name of an existing victim, RCS, the

new victim in this case, and Mladenovic, the existing victim, are one and the same because Mladenovic is the owner of RCS. Under these circumstances, we cannot say the trial court abused its discretion in allowing the state to amend the indictment to add RCS as a victim in the indictment.

{¶21} The first assignment of error is overruled.

B. Sufficiency of the Evidence

{¶22} In the second assignment of error, Lenard argues there was insufficient evidence to support his tampering with records conviction.

{¶23} The test for sufficiency requires a determination of whether the prosecution met its burden of production at trial. *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 12. 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. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶24} Lenard was convicted of tampering with records in violation of R.C. 2913.42(A)(1), which states that “[n]o person, knowing the person has no privilege to do so, and with purpose to defraud * * * shall * * * [f]alsify, destroy, remove, conceal, alter, deface, or mutilate any writing, computer software, data, or record.”

{¶25} Lenard contends there was no evidence that he falsified the quit claim deed because there was no evidence of forgery and Kummerlen executed it voluntarily. However, forgery is not the exclusive means of tampering with records. In *State v.*

McDonald, 9th Dist. Medina No. 02CA0045-M, 2003-Ohio-2427, the court affirmed the defendant's tampering with records conviction where the defendant provided false information on a license application at the bureau of motor vehicles. Although the defendant signed the form, his signature was not a forgery. The court in *McDonald* held that by providing false information in the application, the defendant tampered with the record. *Id.* at ¶ 11.

{¶26} The quit claim deed Lenard presented to Kummerlen purported to transfer Kummerlen's property to Fifth Third via their agent "Richard Kelly." However, Fifth Third had no knowledge whatsoever of this transaction and Richard Kelly was not its agent. Therefore, the deed contained false information. Furthermore, Lenard signed the document as "Richard Kelly" instead of his true name, Richard Lenard. In other words, he falsified his signature on the deed for the purpose of defrauding Kummerlen. Therefore, there was sufficient evidence upon which a rational trier of fact could have found the essential elements of tampering with records proven beyond a reasonable doubt.

{¶27} The second assignment of error is overruled.

{¶28} 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

MARY EILEEN KILBANE, P.J., and
ANITA LASTER MAYS, J., CONCUR