

**IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
HENRY COUNTY**

STATE OF OHIO,

CASE NO. 7-26-02

PLAINTIFF-APPELLEE,

v.

BRIAN TOPP,

**OPINION AND
JUDGMENT ENTRY**

DEFENDANT-APPELLANT.

**Appeal from Henry County Common Pleas Court
Trial Court No. 24 CR 0008**

Judgment Affirmed

Date of Decision: September 21, 2026

APPEARANCES:

Nichole Kanios Papageorgiou for Appellant

Gwen Howe-Gebers for Appellee

WALDICK, J.

{¶1} Defendant-appellant, Brian Topp (“Topp”), appeals the February 25, 2026 judgment of conviction and sentence entered against him for Theft, a first-degree misdemeanor, in the Henry County Court of Common Pleas, upon a remand of this case to the trial court following this Court’s reversal of Topp’s original conviction for Grand Theft, a fourth-degree felony, in Topp’s prior direct appeal. For the reasons set forth below, we affirm.

Procedural History and Relevant Facts

{¶2} This case originated on January 31, 2024, when a Henry County grand jury returned a single-count indictment charging Topp with Grand Theft, a felony of the fourth degree in violation of R.C. 2913.02(A)(2) and (B)(2).

{¶3} The single-count indictment filed in this case alleged in relevant part as follows:

BRIAN E. TOPP, on or about January 1, 2023 through December 31, 2023, at the county of Henry aforesaid, did with purpose to deprive the owner, John Doe & John Doe, DBA Brick n Brew &/or Property Prepers, of property or services, to wit: Money & Services, knowingly obtain or exert control over either the property or services beyond the scope of the express or implied consent of the owner or person authorized to give consent in violation of Ohio Revised Code §2913.02(A)(2), 2913.02(B)(2), Grand Theft, F4.

FURTHERMORE, the property or services stolen is valued at seven thousand five hundred dollars or more and less than one hundred fifty thousand dollars.

(Docket No. 1).

{¶4} On February 21, 2024, an arraignment was held and Topp entered a plea of not guilty to the indictment.

{¶5} On August 20, 2024, a jury trial commenced in the case. During the course of the two-day trial, the prosecution presented the testimony of 10 witnesses and introduced a number of exhibits.

{¶6} At trial, the State of Ohio presented evidence that Topp had been a member of two limited liability companies, Property Prepers, LLC and Brick N Brew, LLC, in which two other men – Ashley Kruse and Clayton Klausing – were also members. The companies were formed in 2019 and 2020, respectively, after the three men decided to purchase and renovate a building in downtown Napoleon, Ohio, with the goal of opening and operating a restaurant and bar called Brick N Brew in the building, all of which they then did over a period of time, beginning in late 2019.

{¶7} The state introduced evidence at trial from Kruse and Klausing that the three owners of the businesses each contributed startup money towards the venture and, further, that they all agreed none of them would receive any money back from the business until an undetermined future date, well after Brick N Brew opened for business and had built up sufficient capital. Once Brick N Brew was ready to open, or shortly thereafter, Micah Behnfeldt was hired as a general manager to run the restaurant and bar. After Behnfeldt worked there for a period of time, he began noticing that the average balance in the business's bank account always seemed

much lower than it should be, based on the business's sales and expenses. Upon Kruse and Klausing reviewing their business bank records for 2023, it was found that Topp had made numerous withdrawals from the business bank accounts, and the withdrawn funds were then deposited into Topp's own personal bank account or used to directly pay his personal expenses, including such things as car and mortgage payments, insurance, child support, and utilities.

{¶8} After a police report was made and an investigation was conducted by Detective James Augustine of the Napoleon Police Department, it was determined that Topp had converted \$13,344.48 in funds from the Property Prepers bank account and \$31,534.71 from the Brick N Brew bank account. Augustine interviewed Topp, who acknowledged withdrawing funds from the business accounts for his personal use, but claimed he was entitled to do so. However, the evidence adduced through the testimony of Kruse and Klausing at trial established that the three members of the two business entities had never voted or otherwise agreed that Topp was permitted to receive disbursements or make withdrawals from the business accounts for his personal use.

{¶9} At the close of the state's case at trial, the prosecution moved to amend the indictment with regard to the alleged victims specified therein. The defense did not oppose the requested amendment, and the trial court granted the state's motion. The defense then presented the testimony of one witness before resting its case.

{¶10} Prior to the case being submitted to the jury, it was noted on the record – outside the presence of the jury – that, while the indictment charged a theft of property valued at \$7500.00 or more, known as “Grand Theft” pursuant to R.C. 2913.02(B)(2), the state’s evidence at trial established that no individual misappropriation of funds made by Topp was in an amount equal to or over \$7500.00. The trial court therefore determined that, because the prosecution was apparently relying on an aggregate value of \$7500.00 or more to prove the fourth-degree felony theft alleged in the indictment, a jury instruction should be given based on R.C. 2913.61, which sets forth circumstances under which the value of property or services involved in a series of theft offenses must be or may be aggregated for purposes of determining the value-based degree of felony involved.

{¶11} The trial court thereafter included an instruction of that nature in its general charge to the jury and, following the jury receiving instructions of law from the trial court, the case was submitted to the jury for deliberation.

{¶12} On August 21, 2024, at 6:53 p.m., the jury returned a verdict finding Topp guilty of Grand Theft, a fourth-degree felony, as charged in the amended indictment.

{¶13} On September 23, 2024, a sentencing hearing was held and Topp was sentenced to a two-year term of community control.

{¶14} On October 2, 2024, Topp filed a direct appeal of that conviction and sentence.

{¶15} On July 7, 2025, in *State v. Topp*, 2025-Ohio-2388 (3d Dist.), this Court in that direct appeal reversed Topp’s conviction and sentence for Grand Theft, a fourth-degree felony, after finding that the indictment failed to allege, as required by R.C. 2913.61, any of the circumstances under which the value of property involved in a series of theft offenses may be aggregated pursuant to that statute for purposes of determining the value-based degree of felony involved.

{¶16} Specifically, this Court determined in the direct appeal that, “as Topp was not provided with any notice as required by R.C. 2913.61(C)(4) that the prosecution intended to aggregate multiple theft offenses into a single count for purposes of establishing the value alleged in the indictment, the prosecution acted without legal authority in trying the offenses as a single offense and in aggregating the value of the funds stolen.” *Topp, supra*, at ¶ 33. For that reason, we held that reversal of Topp’s conviction as it related to the aggregated value of the individual theft offenses at issue was required. *Id.* As the basis of that reversal related solely to the minimum \$7500.00 value alleged in the indictment, but because the indictment was otherwise valid on its face, and because the jury – separate from its finding relating to value – had found beyond a reasonable doubt that Topp was guilty of Theft, this Court ordered that the case be remanded to the trial court so that a judgment of conviction for Theft, a first-degree misdemeanor, could be entered against Topp. *Topp*, at ¶ 34.

{¶17} On July 17, 2025, Topp filed an application for reconsideration in this Court. On August 21, 2025, this Court filed a judgment entry denying Topp's application for reconsideration.

{¶18} On October 6, 2025, Topp filed a notice of appeal and a memorandum in support of jurisdiction in the Supreme Court of Ohio. On December 23, 2025, the Ohio Supreme Court filed a judgment entry declining to accept jurisdiction of the appeal. *State v. Topp*, 2025-Ohio-5661. The case was then remanded to the trial court.

{¶19} On remand, Topp filed a Remand Memorandum in the trial court on February 17, 2026, arguing that the trial court should not sentence him as directed by this Court. On February 23, 2026, a re-sentencing hearing was held in the trial court. At that time, the trial court found that it was obligated to follow the order of this Court, denied Topp's request, and proceeded to sentence Topp for Theft, a first-degree misdemeanor. On February 25, 2026, the trial court filed a judgment entry setting forth those decisions.

{¶20} On March 2, 2026, Topp filed this appeal of the February 25, 2026 judgment of the trial court, in which he raises four assignments of error for this Court's review.

First Assignment of Error

Topp's misdemeanor theft conviction is plainly erroneous because a single, combined felony-theft charge, involving multiple victims, prosecuted under R.C. 2913.61(C) is legally distinct from

a single-offense prosecution. Thus, there can be no “lesser-included” or “inferior degree” conviction when the state fails to produce sufficient evidence of a common course of conduct to defraud multiple victims.

Second Assignment of Error

Topp’s misdemeanor conviction is erroneous as a matter of law because nothing in Ohio law allows a trial court to convict a defendant on an unindicted, undefined, and non-unanimous misdemeanor theft flowing from an unlawful prosecution.

Third Assignment of Error

Topp’s trial counsel rendered ineffective assistance by advocating for the expansion of the indictment to the prejudice of Topp after failing to raise the state’s lack of proof surrounding the essential element of a common course of conduct to defraud multiple victims.

Fourth Assignment of Error

Even if this court determined that none of the individual errors plaguing Topp’s trial merit reversal standing alone, the combined effect of these errors deprived Topp of his constitutional rights, requiring reversal under the cumulative-error doctrine.

Analysis of Assignments of Error

First and Second Assignments of Error

{¶21} In the first and second assignments of error, which we shall jointly address, Topp raises various arguments in which he asserts that this Court erred in determining, on direct appeal, that our reversal of his felony theft conviction, for the reasons described above, warranted a reduction in the degree of the offense of which Topp was found guilty and then re-sentencing on remand for a misdemeanor theft

conviction. Topp argues that this Court's decision on direct appeal, and also various issues involved in his 2024 jury trial, should result in Topp being entitled to a full acquittal.

As the Supreme Court of Ohio set forth in *State v. Wilson*, 2011-Ohio-2669:

The doctrine of res judicata establishes that “a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment.” *State v. Perry* (1967), 10 Ohio St.2d 175, 39 O.O.2d 189, 226 N.E.2d 104, at paragraph nine of the syllabus. The scope of an appeal from a new sentencing hearing is limited to issues that arise at the new sentencing hearing. See *State v. Fischer*, 128 Ohio St.3d 92, 2010 Ohio 6238, 942 N.E.2d 332, at ¶ 40. The doctrine of res judicata does not bar a defendant from objecting to issues that arise at the resentencing hearing or from the resulting sentence.

Id., at ¶ 30.

{¶22} Thus, in the instant case, to the extent Topp assigns error with issues stemming from his trial in 2024, such claims are barred by res judicata. While Topp retained the right to raise in this appeal any issues arising at his resentencing hearing on remand, any prior issues stemming from his 2024 trial that were not challenged in the direct appeal of his conviction are outside the scope of the remand in this case and are precluded from further review by this Court under the principles of res judicata.

{¶23} To the extent Topp now assigns error with this Court's prior decision in his direct appeal, such issues are not properly raised in this appeal. Similar to the

doctrine of res judicata, “the doctrine of the law of the case provides that ‘the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.’” *State v. Moore*, 2026-Ohio-167, ¶ 8 (3d Dist.), quoting *Nolan v. Nolan*, 11 Ohio St.3d 1, 3 (1984).

{¶24} More importantly, this Court lacks the authority at this time to reconsider our prior judgment in this case, which is what Topp seeks to have us do.

{¶25} As noted above, this Court issued our decision in Topp’s direct appeal, *State v. Topp*, 2025-Ohio-2388 (3d Dist.), on July 7, 2025. On July 17, 2025, Topp filed an application in this Court pursuant to App.R. 26(A), requesting that we reconsider that decision. On August 21, 2025, this Court declined that application. Following that, on October 6, 2025, Topp filed a notice of appeal and a memorandum in support of jurisdiction in the Supreme Court of Ohio. On December 23, 2025, the Ohio Supreme Court filed a judgment entry declining to accept jurisdiction of the appeal. *State v. Topp*, 2025-Ohio-5661. The case was then remanded to the trial court.

{¶26} As the Supreme Court of Ohio noted in *State ex rel. LTV Steel Co. v. Gwin*, 64 Ohio St.3d 245 (1992), “[c]ourts of appeal have jurisdiction to reconsider their judgments on a timely motion filed pursuant to App.R. 26 until an appeal as of right is filed in this court, or this court rules on a motion to certify the record.” *Id.*, at 249, citing *State v. Murphy*, 49 Ohio St.3d 293 (1990), and *Cincinnati v. Alcorn*,

122 Ohio St. 294 (1930). Additionally, notwithstanding App.R. 26(A), the Supreme Court of Ohio recognized in *LTV Steel Co.* that a court of appeals has inherent authority to reconsider its own decisions, and it may do so even on its own initiative. *Id.* However, “this inherent authority does not last forever – once the time for filing an appeal in [the Supreme Court of Ohio] runs, the court of appeals’ jurisdiction to reconsider its judgment ends.” *Shields v. Bureau of Worker’s Comp.*, 2024-Ohio-5743, ¶ 35 (Kennedy, C.J., dissenting), citing *LTV Steel Co.*, at 249-250. “Again, when “an appeal to [the Supreme Court of Ohio] is no longer available, the judgment of the court of appeals is final and cannot be reconsidered. Ohio Const., art. IV, § 3(B)(3).” *Id.*

{¶27} Thus, “except as provided by law, this Court lacks jurisdiction to review its own orders on appeal. See Ohio Constitution, Article IV, Section 3.” *State v. Bush*, 2023-Ohio-4473, ¶ 200 (3d Dist.).

{¶28} Accordingly, in the instant appeal, there is no legal basis permitting this Court to reconsider our prior decision in Topp’s direct appeal.

{¶29} For all of the reasons stated, the first and second assignments of error are overruled.

Third Assignment of Error

{¶30} In the third assignment of error, Topp argues that he was deprived of the effective assistance of counsel. However, Topp does not challenge his counsel’s performance at the February 23, 2026 re-sentencing hearing nor does he raise any

other issue with counsel's representation in the trial court on remand. Rather, Topp claims that he was denied the effective assistance of counsel during his jury trial in 2024.

{¶31} As discussed above, res judicata precludes a defendant "who has had his day in court from seeking a second on that same issue." *State v. Saxon*, 2006-Ohio-1245, ¶ 18.

{¶32} As Topp was represented by different counsel in his direct appeal than during the trial proceedings in the trial court, he could have challenged his trial representation on direct appeal. *State v. Jackson*, 2016-Ohio-5488, ¶ 118, citing *State v. Szefcyk*, 77 Ohio St.3d 93, syllabus (1996) (res judicata bars a defendant from raising and litigating any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial or on a direct appeal).

{¶33} Accordingly, in the instant appeal, Topp is barred by the doctrine of res judicata from raising claims of ineffective assistance relating to his trial counsel. *Id.*

{¶34} The third assignment of error is overruled.

Fourth Assignment of Error

{¶35} In the fourth assignment of error, Topp argues that cumulative error relating to his jury trial in 2024 requires reversal of his conviction.

{¶36} For the reasons previously explained, and on the basis of the authority set forth above, the claim raised by Topp in the fourth assignment of error is also barred by the doctrine of res judicata.

{¶37} The fourth assignment of error is overruled.

Conclusion

{¶38} Having found no error prejudicial to the defendant-appellant in the particulars assigned and argued, the February 25, 2026 judgment of the Henry County Court of Common Pleas is affirmed.

Judgment Affirmed

MILLER and WILLAMOWSKI, J.J., concur in judgment only.

JUDGMENT ENTRY

For the reasons stated in the opinion of this Court, the assignments of error are overruled and it is the judgment and order of this Court that the judgment of the trial court is affirmed with costs assessed to Appellant for which judgment is hereby rendered. The cause is hereby remanded to the trial court for execution of the judgment for costs.

It is further ordered that the Clerk of this Court certify a copy of this Court's judgment entry and opinion to the trial court as the mandate prescribed by App.R. 27; and serve a copy of this Court's judgment entry and opinion on each party to the proceedings and note the date of service in the docket. See App.R. 30.

Juergen A. Waldick, Judge

Mark C. Miller, Judge
Concurs in Judgment Only

John R. Willamowski, Judge
Concurs in Judgment Only

DATED:
/jlm