[Cite as *State v. Zeune*, 2011-Ohio-93.]

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	Julie A. Edwards, P.J.
	:	W. Scott Gwin, J.
Plaintiff-Appellee	:	Sheila G. Farmer, J.
	:	
-vs-	:	Case No. 10 CA 06
	:	
	:	
RODNEY D. ZEUNE	:	O P I N I O N

Defendant-Appellant

CHARACTER OF PROCEEDING:	Criminal Appeal from Knox County Court of Common Pleas Case No. 09 CR 03-0023
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	January 10, 2011

APPEARANCES:

For Plaintiff-Appellee

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For Defendant-Appellant

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Edwards, P.J.

{¶1} Appellant, Rodney D. Zeune, appeals a judgment of the Knox County Common Pleas Court convicting him of two counts of passing bad checks (R.C. 2913.11) and sentencing him to 17 months incarceration on each count, to be served concurrently. Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} Appellant formed a corporation known as Zeune, Inc., which operated a gas station called "Hot Rod's" in Knox County. The business used a checking account with First Knox National Bank in Mount Vernon. Appellant was the primary account holder for the Zeune, Inc. account. Bridgette Wade, appellant's office manager in 2008, also had signature authority on the account.

{¶3} The corporation purchased bulk fuel for Hot Rod's from the Central Ohio Farmer's Coop (COFC). COFC owned two companies through which it provided fuel to its customers: Hollis Oil and Marion Oil. Gas and diesel fuel was delivered to Hot Rod's on a weekly basis.

{¶4} Beginning in July of 2008, three checks were tendered by Zeune to pay for fuel purchases from COFC which were returned by First Knox National Bank for insufficient funds. Check number 4413 was issued on July 21, 2008 for $34,028.69 and signed by Bridgette Wade. Check number 4619 was issued on September 6, 2008, for $29,707.75 and signed by Bridgette Wade. Check number 4728 was issued on October 14, 2008, for $29,226.49 and signed by appellant.

{¶5} On August 11, 2008, appellant personally appeared at Hollis Oil and tendered $25.00, the fee for the returned check issued in July. However, after the third

check bounced in October, Hollis put appellant on a cash basis. Following notification that he must pay cash to Hollis, appellant faxed Hollis a letter claiming that he had an employee embezzle over $100,000 and counting, completely wiping out his IRA account. Appellant claimed he was trying to solve the problem, but noted that if he could not keep the fuel running at the gas station, the problem would worsen.

{¶6} Timothy McNamara, credit manager for COFC, personally delivered to appellant the 10-day insufficient funds notifications on October 29, 2008. Appellant offered a real estate mortgage on land to pay the debt, but had no documentation to prove that he owned the land he offered to mortgage. Appellant engaged in no other discussions about making good on the bad checks, and after 10 days had passed COFC turned the matter over to the police.

{¶7} Appellant was indicted by the Knox County Grand Jury on three counts of passing bad checks. Following jury trial in the Knox County Common Pleas Court, he was acquitted of Count One, involving the check issued on July 21, 2008. He was convicted of the other two charges and sentenced to 17 months incarceration on each count, to be served concurrently. He assigns three errors on appeal:

{¶8} "I. THE PROSECUTING ATTORNEY IMPERMISSIBLY SHIFTED THE BURDEN OF PROOF TO THE DEFENDANT (WHO DID NOT TESTIFY) BY MAKING IMPROPER COMMENT DURING CLOSING ARGUMENT.

{¶9} "II. THE TRIAL COURT ERRED IN PERMITTING THE 'REBUTTABLE PRESUMPTION' JURY INSTRUCTION OF §2913.11(c) WHERE THE DEFENDANT WAS NOT SHOWN TO BE THE 'DRAWER' OF THE CHECK.

{¶10} "III. THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUSTAIN CONVICTIONS FOR PASSING BAD CHECKS, FOR FAILURE TO ADDUCE EVIDENCE OF 'PURPOSE TO DEFRAUD.'

{¶11} "IV. THE CONVICTIONS FOR PASSING BAD CHECKS ON COUNTS TWO AND THREE WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I

{¶12} Appellant argues that the prosecutor committed misconduct in closing argument by impermissibly shifting the burden of proof to appellant.

{¶13} The test for prosecutorial misconduct is whether the prosecutor's comments and remarks were improper and if so, whether those comments and remarks prejudicially affected the substantial rights of the accused. *State v. Lott* (1990), 51 Ohio St.3d 160. In reviewing allegations of prosecutorial misconduct, it is our duty to consider the complained of conduct in the context of the entire trial. *Darden v. Wainwright* (1986), 477 U.S. 168.

{¶14} R.C. 2913.11(C) sets forth a rebuttable presumption by which the state may prove that a bad check was issued knowing it would be dishonored:

{¶15} "(C) For purposes of this section, a person who issues or transfers a check or other negotiable instrument is presumed to know that it will be dishonored if either of the following occurs:

{¶16} (2) The check or other negotiable instrument was properly refused payment for insufficient funds upon presentment within thirty days after issue or the stated date, whichever is later, and the liability of the drawer, indorser, or any party who

may be liable thereon is not discharged by payment or satisfaction within ten days after receiving notice of dishonor."

{¶17} Appellant argues that the following remarks by the prosecutor in closing argument concerning the statutory presumption impermissibly shifted the burden of proof to him:

{¶18} "I told you about two presumptions; the presumption of innocence, but a second presumption that has to do with a bad check notice. Remember the football analogy? The State's proven in this case that we moved the ball down the field. We're down to the 20 yard line, and it's a chip shot field goal." Tr. 319.

{¶19} "As a jury you may utilize that presumption that the law says you may use to convict the Defendant on all three counts of passing bad checks. Now you may also consider the evidence that he tried to present through his cross-examination and the two witnesses he put on this morning to decide did he block the kick or not. Did he try to block it with lineman who are 4 ½ feet tall or did he try to block it with linemen who were 6'8". I think he tried to block the kick with short people." Tr. 320.

{¶20} "I mean how hard do we have to work here." Tr. 327.

{¶21} "That's why we have the 10 day notices. You can presume that. Defendant's not required to rebut or block the kick but he may if he chooses to and he tried to in this case, and I think he tried to unsuccessfully." Tr. 345.

{¶22} The comments by the prosecutor were fair comments on the statutory presumption met by the state with evidence that appellant received 10-day insufficient funds notices and did not discharge the liability by payment thereafter. The state did not convey to the jury that the burden of proof had shifted to appellant, or that they were

required to accept the presumption. In fact, before the comment at Tr. 345 concerning appellant's attempt to rebut the presumption, the prosecutor clearly conveyed to the jury that they were not required to apply the statutory presumption:

{¶23} "The law says that that purpose to defraud exists as a presumption. That's what it says. You can just go ahead and say the law tells us we can presume that the Defendant knew those checks were going to bounce when they were issued or transferred. We may do that. It's not required, but we may." Tr. 345.

{¶24} Further, the court clearly instructed the jury concerning burden of proof. The court instructed the jury that appellant was presumed innocent unless the State produced evidence which convinced them beyond a reasonable doubt of every essential element of every charge in the indictment. Tr. 350-351. The court instructed them concerning appellant's constitutional right not to testify. Tr. 353. The court instructed the jury concerning the statutory presumption of knowledge of dishonor. Tr. 356. The court went on to instruct the jury as to each of the individual counts, restating as to each count that the State must prove each element beyond a reasonable doubt before they could convict. Tr. 356-358.

{¶25} The prosecutor did not commit misconduct in closing argument. The first assignment of error is overruled.

II

{¶26} In his second assignment of error, appellant argues that the court erred in instructing the jury as to the statutory presumption found in R.C. 2913.11(C) on Count 2, the check signed by Bridgette Wade, because appellant was not the drawer of the check as defined in R.C. 1303.01(A)(3):

{¶27} "(A) As used in this chapter, unless the context otherwise requires:

{¶28} "(3) 'Drawer' means a person who signs or is identified in a draft as a person ordering payment."

{¶29} Appellant argues that he did not sign the check, nor is he identified as ordering payment.

{¶30} We note that R.C. 1303.01(A) specifically provides that the definitions that follow are "as used in *this chapter*," (emphasis added), not as used throughout the entire Ohio Revised Code. The definition by its terms does not necessarily apply to Chapter 29.

{¶31} Further, R.C. 2913.11 provides in pertinent part:

{¶32} "(B) No person, with purpose to defraud, shall issue or transfer *or cause to be issued or transferred a check* or other negotiable instrument, knowing that it will be dishonored or knowing that a person has ordered or will order stop payment on the check or other negotiable instrument.

{¶33} "(C) For purposes of this section, a person who issues or transfers a check or other negotiable instrument is presumed to know that it will be dishonored if either of the following occurs:

{¶34} "(2) The check or other negotiable instrument was properly refused payment for insufficient funds upon presentment within thirty days after issue or the stated date, whichever is later, and the liability of the drawer, indorser, *or any party who may be liable thereon* is not discharged by payment or satisfaction within ten days after receiving notice of dishonor." (Emphasis added).

{¶35} The statutory presumption is not limited to the drawer of the check, but also includes any party who causes a check to be issued or transferred. Appellant was the primary account holder on the checking account. Signature cards with the bank demonstrated that he had given Bridgette Wade authority to sign checks on the account. Appellant therefore was a party who caused the check to be issued pursuant to R.C. 2913.11(B), regardless of whether he was a "drawer" within the meaning of Chapter 13 of the Ohio Revised Code.

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

III, IV

{¶37} In his third and fourth assignments of error, appellant argues that his convictions are against the manifest weight and sufficiency of the evidence.

{¶38} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a thirteenth juror and "in reviewing the entire record, 'weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in evidence the jury 'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541, 1997-Ohio-52, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶39} An appellate court's function when reviewing the sufficiency of the evidence is to determine 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* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶40} R.C. 2913.11 defines the offense of passing bad checks:

{¶41} "(B) No person, with purpose to defraud, shall issue or transfer *or cause to be* issued or transferred a check or other negotiable instrument, knowing that it will be dishonored or knowing that a person has ordered or will order stop payment on the check or other negotiable instrument.

{¶42} "(C) For purposes of this section, a person who issues or transfers a check or other negotiable instrument is presumed to know that it will be dishonored if either of the following occurs:

{¶43} "(2) The check or other negotiable instrument was properly refused payment for insufficient funds upon presentment within thirty days after issue or the stated date, whichever is later, and the liability of the drawer, indorser, or any party who may be liable thereon is not discharged by payment or satisfaction within ten days after receiving notice of dishonor."

{¶44} There was evidence presented that the two checks upon which appellant was convicted were dishonored for insufficient funds. Evidence was presented to show that there were insufficient funds to pay each check on the date of issuance and on the date of presentment. Appellant was the primary account holder on the checks, and bank statements and overdraft notices were mailed to him at his business address. Evidence was presented that his business address was also his residence. There was evidence that appellant was personally served with a 10-day notice on October 29, 2008, yet the checks remained unpaid 10 days later.

{¶45} Further, there was evidence that after the first check was dishonored, upon which appellant was acquitted, he personally paid Emilee Hollis a $25.00 bad check fee, thus demonstrating that he had notice that checks were not being honored on his account prior to the issuance of the checks on which he was convicted.

{¶46} The judgment is supported by sufficient evidence and is not against the manifest weight of the evidence.

{¶47} The judgment of the Knox County Common Pleas Court is affirmed.

By: Edwards, P.J.

Gwin, J. and

Farmer, J. concur

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JUDGES

JAE/r0823

[Cite as *State v. Zeune*, 2011-Ohio-93.]

IN THE COURT OF APPEALS FOR KNOX COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
RODNEY D. ZEUNE	:	
Defendant-Appellant	:	CASE NO. 10 CA 06

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Knox County Court of Common Pleas is affirmed. Costs assessed to appellant.

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JUDGES