[Cite as *State v. Bankston*, 2010-Ohio-1576.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92777

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANGELIQUE BANKSTON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-508144 and CR-515725

BEFORE: Stewart, P.J., Celebrezze, J., and Jones, J.

RELEASED: April 8, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

MELODY J. STEWART, P.J.:

{¶ 1} Defendant-appellant, Angelique Bankston, appeals from two separate criminal cases that have been consolidated for briefing and disposition. In CR-508144, a jury found Bankston guilty of two counts of passing bad checks and one count of theft when checks she wrote for two separate purchases at a department store were dishonored after she had returned the merchandise for a cash refund. In CR-515725, Bankston pleaded guilty to vandalism and falsification. The court simultaneously sentenced Bankston in both cases and ordered that those sentences be served consecutively. In ten assignments of error, Bankston raises issues relating to trial errors, complains about the sufficiency and weight of the evidence, and challenges aspects of her sentence. We find no error and affirm.

{¶ 2} The charges in CR-508144 arose after a loss prevention specialist for a department store reviewed closed circuit footage of Bankston exchanging goods for a cash refund. The size of the refund raised the loss prevention specialist's suspicions, so she reviewed Bankston's prior purchases at the department store and discovered that Bankston had previously purchased goods by check, only to return those goods the following day and request a cash refund.

{¶ 3} The loss prevention specialist testified that on January 10, 2007, Bankston purchased merchandise in the amount of $258 using a check drawn on an account at the First Merit Bank. The First Merit check listed a city of

Cleveland address. Bankston returned those goods the following day, requesting a cash refund. Although the department store usually required seven to ten business days to pass before issuing a cash refund for purchases made by check, the sales associate who handled the merchandise return did not follow that policy and issued a cash refund.

{¶ 4} A second transaction occurred on January 31, 2007 (Bankston dated the check "1/1/07"). Bankston purchased merchandise in the amount of $548.25 and paid for it with a check drawn on an account with Charter One Bank. The Charter One check listed an address in the city of Cleveland Heights. Bankston returned the goods the following day and again requested and received a cash refund.

{¶ 5} The loss prevention specialist noticed that the two checking accounts had different addresses. She then called Charter One Bank and learned that Bankston had insufficient funds in her account to cover the draft. By this time, the check written on the First Merit Bank checking account had been returned for insufficient funds. The loss prevention specialist then sent a letter by certified mail to both addresses, informing Bankston that the checks had been returned for insufficient funds. The loss prevention specialist demanded that Bankston pay a total of $866.25 (including separate service fees of $30) by certified check or money order within ten days or the matter would be turned over to the prosecuting attorney. One of the certified

letters was returned with a signed receipt; the other was returned as undeliverable.

{¶ 6} Bankston did not respond within ten days, so the loss prevention specialist contacted the police and filed criminal charges. Sometime after charges were filed against her, Bankston appeared at the department store and spoke with the loss prevention specialist, but the loss prevention specialist told Bankston that charges had been filed and that she should speak with the police. Bankston told the loss prevention specialist that there may have been fraud on her account.

{¶ 7} Bankston returned to the store two months later, spoke with the loss prevention specialist, and paid off the total amount owed to the department store, including processing fees, in cash.

{¶ 8} A paralegal for First Merit Bank testified that Bankston had a home equity line of credit with the bank. As of January 29, 2007, the line of credit had a limit of $23,250 but the account had a credit balance of $23,933.69, meaning that Bankston had no credit available on January 10, 2007 when she wrote her check.

{¶ 9} A fraud investigator for Charter One Bank testified that on February 1, 2007, Bankston had a negative balance of $214.53 in her checking account. However, he conceded that the "daily balance" on Bankston's account on January 31, 2007, showed a positive balance of $788.34.

I

{¶ 10} For her first assignment of error, Bankston complains that she was denied her right of confrontation and cross-examination when the court permitted the two bank employees to testify about bank records because neither employee had personal knowledge of those records or of the record keeping system that produced the document.

{¶ 11} Hearsay is generally inadmissible, unless it falls within the scope of an exception within the Rules of Evidence. Evid.R. 802; *State v. DeMarco* (1987), 31 Ohio St.3d 191, 195, 509 N.E.2d 1256. One such exception applies to "records of regularly conducted activity." See Evid.R. 803(6). The rationale behind Evid.R. 803(6) is that if information is sufficiently trustworthy that a business is willing to rely on it in making business decisions, the courts should be willing to as well. See Staff Note to Evid.R. 803(6).

{¶ 12} "To qualify for admission under Rule 803(6), a business record must manifest four essential elements: (i) the record must be one regularly recorded in a regularly conducted activity; (ii) it must have been entered by a person with knowledge of the act, event or condition; (iii) it must have been recorded at or near the time of the transaction; and (iv) a foundation must be laid by the 'custodian' of the record or by some 'other qualified witness.' *State v. Davis*, 116 Ohio St.3d 404, 880 N.E.2d 31, 2008-Ohio-2, ¶171, quoting

Weissenberger, Ohio Evidence Treatise (2007) 600, Section 803.73. See also *McCormick v. Mirrored Image, Inc.* (1982), 7 Ohio App.3d 232, 233; 454 N.E.2d 1363." Even after these elements are established, however, a business record may be excluded from evidence if 'the source of information or the method or circumstances of preparation indicate lack of trustworthiness.'" *Davis* at ¶171, quoting Evid.R. 803(6).

{¶ 13} When a party offers a record into evidence, the record must be properly identified or authenticated "by evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid.R. 901(A). When construing the identical Fed.R.Evid. 803(6), the federal courts have held that the authenticity of bank statements can be recognized by judicial notice. See *F.D.I.C. v. Howeth* (C.A.5, 1995), 46 F.3d 65.

{¶ 14} The bank employees identified bank statements from their respective banks and similarly testified that the statements were documents kept in the ordinary course of each business. The court was able to examine the bank statements and verify their substance, thus allowing the court to take judicial notice that the records were what they purported to be. Bankston offered no objection at trial to the authenticity of the statements or their trustworthiness, so we have no basis for finding that the court abused its discretion by finding that the statements had been properly authenticated.

II

{¶ 15} In her second assignment of error, Bankston complains that the court abused its discretion by refusing to allow her to recall a state witness — a police detective — for the purpose of exploring "some inconsistency" in the testimony as to when she went back to the department store and the detective's "understanding" of when she went back to the store.

{¶ 16} The trial judge has the broad discretion to exercise "reasonable control over the mode and order of interrogating witnesses * * *." See Evid.R. 611. That discretion extends to permitting a witness to be "recalled for the purpose of correcting or changing testimony which the witness, through error, mistake, or oversight, has previously given in a trial." *State v. McBride*, 5th Dist. No. 2008-CA-00076, 2008-Ohio-5888, at ¶33, quoting *Stillson v. State* (1933), 204 Ind. 379, 184 N.E. 260, 263. See, also, *State v. Spirko* (1991), 59 Ohio St.3d 1, 28, 570 N.E.2d 229. We review the court's decision to permit or deny the recall of a witness for an abuse of discretion. *State v. Burneson*, 8th Dist. No. 88767, 2007-Ohio-4037, at ¶8.

{¶ 17} Bankston sought to recall the detective "only on some small portion regarding there is some inconsistency regarding when Miss Bankston actually went to [the department store] and what his understanding [sic] of when she went to [the department store]."

{¶ 18} The state objected to recalling the detective. The court noted that the detective testified that he was not the originally-assigned detective on the

case and took over the investigation in July 2008, well after the events occurring in 2007. Defense counsel told the court that the information he sought would be contained in the police file, but the court noted that the file itself would not be subject to cross-examination because the originally-assigned detective was unavailable. Moreover, the court asked defense counsel if he would be "opening the door to [the detective] testifying to everything else?" Defense counsel replied, "I understand what you are saying. We would rest our case, renew our Rule 29 motion and proceed to closing at this time."

{¶ 19} We agree with the state's argument that the court did not deny Bankston's request to recall the detective, but that Bankston withdrew her request to recall the detective after considering the court's warning that she would be opening the door to the entire contents of the file.

{¶ 20} However, even if we were to find that the court denied the request to recall the detective, the court would not have abused its discretion by doing so. Bankston was not alleging a discovery violation or that the state had any obligation to grant access to the police file under *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215. Nor is Bankston alleging that there was some error or omission in the detective's testimony that required correction or clarification. Bankston's request to recall the detective came just after he finished testifying for the state (separated only by a lunch break),

so the court heard no new testimony or evidence that might have called the detective's testimony into question. By all appearances, defense counsel simply thought of one more question to ask the detective — a question that the detective could not answer from first-hand knowledge.

{¶ 21} We likewise find that any testimony as to when Bankston returned to the department store had no probative value. Bankston notes that she was originally indicted in April 2007, but that case was dismissed and reindicted in March 2008. She claims she was entitled to inquire why she had been reindicted. The detective could not have aided this inquiry because the case had been reindicted before he took over the case. He would have no first-hand knowledge of why the case had been reindicted. In any event, the prosecuting attorney alone has the broad discretion to determine whether to prosecute. *State v. Mink,* 101 Ohio St.3d 350, 2004-Ohio-1580, 805 N.E.2d 1064, at ¶103; *State v. Troyer* (Apr. 1, 1993), 8th Dist. No. 61983.

{¶ 22} With the detective lacking first-hand knowledge on the decision to reindict and it being unclear precisely what information the police file might have contained that would shed light on the prosecuting attorney's decision to reindict the case, the court did not abuse its discretion by denying the request to recall the detective.

III

{¶ 23} The third assignment of error complains that Bankston was denied her right of access to evidence because videotape taken from the closed circuit surveillance camera viewed by the department store's loss prevention specialist could not be located — the loss prevention specialist said that she turned the tapes over to the now-retired detective, but the police had no record of ever receiving any videotapes (the retired detective now lives in the state of Washington and did not testify at trial). She maintains that the failure to locate the tapes prevented her from showing that some other person either presented the checks or appeared at the department store and obtained a refund.

{¶ 24} Although there was some dispute as to whether a videotape even existed, we find no possibility that it contained evidence that would have been of benefit to Bankston. In her opening statement to the jury, Bankston conceded that the checks were drawn on her account, but implied that the state had no evidence to show that she signed the checks: during opening statement defense counsel told the jury to "[l]ook for someone to come into this courtroom and identify my client, point to her at the defendant's table and say that this is the person that issued these checks * * *." Defense counsel further told the jurors, "[t]o my understanding, based on the discovery responses, that the State will be presenting some type of surveillance tape regarding these transactions. Look closely at what the video shows."

{¶ 25} With no videotape having been located by the state and turned over to the defense, any argument about what the tape might have depicted was pure speculation.[1] For its part, the state offered testimony by the department store loss prevention specialist who identified Bankston as the person she saw on the surveillance camera and further identified her as the person who returned to the bank and paid off the balance. At no point did Bankston offer any evidence to contradict the loss prevention specialist's identification; for example, by offering a handwriting expert to show that another person wrote the checks.

{¶ 26} It may be that defense counsel was aware that the state had no videotape and hoped to exploit that absence to create an issue of credibility with the loss prevention specialist's identification. That is an argument relating to the weight of the evidence, which we will address shortly. But for our purposes here, we find no basis for concluding that any lack of access to evidence prejudiced Bankston.

IV

{¶ 27} For her fourth assignment of error, Bankston complains that she was denied due process of law when the court overruled her challenge to the state's excusing for cause of an African-American juror due to bias. She

[1] Counsel's failure to view the videotape is an issue that Bankston raised in a petition for postconviction relief. The court denied relief and Bankston has appealed in Appeal No. 94364.

maintains that the state's reason for excusing the juror — that the juror "had some dealings with the justice system" — had no basis.

{¶ 28} We need not engage in an extended analysis of the law set forth in *Batson v. Kentucky* (1986), 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, which prohibits a state actor from engaging in racial discrimination in exercising peremptory challenges. Even assuming that Bankston made out a prima facie case under *Batson*, it is plain that the state articulated a race-neutral reason for excluding the prospective juror. *State v. Tillman* (1997), 119 Ohio App.3d 449, 695 N.E.2d 792.

{¶ 29} Bankston's statement that the excluded juror had "some dealings" with the criminal justice system is a mischaracterization: the juror in question told the court that his step-grandson had been wrongly convicted of murder and the experience left him deeply distrustful of the criminal justice system. The prospective juror told the court that the step-grandson had not been involved in the murder but had been implicated as an aider and abettor. The prospective juror also told the court that the step-grandson had been offered a plea deal and refused it, and that he and his family believed that a plea bargain was related to money — that some people could "buy their way out" of a charge. When asked if he wanted to be a part of this "unfair" system, the prospective juror said, "[n]o. To tell the truth, no." When asked if he could keep an open mind as to whether the system could be fair, the

prospective juror replied, "I'm trying." The court later inquired whether the prospective juror could "just look at the evidence and the law without regard to race, creed, gender, color, any of those things?" He replied, "[t]hat's hard." He told the state that "I have known the system to be unfair to a lot of friends of mine."

{¶ 30} The state asked the prospective juror to be removed for cause based on his belief that the "system" was unfair. The court denied the request, noting that the juror was "off and on" but that he would try to be impartial. The state later used a peremptory challenge on the juror for the same reasons. In response to Bankston's *Batson* challenge, the court stated:

{¶ 31} "Quite frankly, the Court denied the motion for cause on [the prospective juror] with an abundance of caution. The court was very concerned with [the prospective juror's] statement that the unfairness of the system is evidenced all around him, just pick up any paper, look at any media outlet, et cetera, and yet he had no firsthand knowledge or experience of the system.

{¶ 32} "Everything he learned about the system was second, third or even more removed from firsthand experience, all based on hearsay, both through his family experience with his stepson [sic], which he wasn't even clear, quite frankly, about the facts of that, and through the media, and the Court is also fearful of people who believe everything that they read in the

media, because we all know that we can pick up the paper about our own cases and it is not accurate or complete.

{¶ 33} "I do find that there is a race-neutral position or basis for removing this juror. The Court will note that the last African-American removed by the State was replaced by [the prospective juror]. It was not raised at that time, so it is not really true. It is only that one seat was removed and held by two different people who were the same race."

{¶ 34} We review *Batson* determinations with great deference, and a trial court's finding of no discriminatory intent will not be reversed unless clearly erroneous. *Hernandez v. New York* (1991), 500 U.S. 352, 365, 111 S.Ct. 1859, 114 L.Ed.2d 395. A race-neutral explanation for a peremptory challenge is simply "an explanation based on something other than the race of the juror." Id. at 360. Although some relevancy is required of the explanation, it does not need to be "'persuasive, or even plausible'; so long as the reason is not inherently discriminatory, it suffices." *Rice v. Collins* (2006), 546 U.S. 333, 338, 126 S.Ct. 969, 163 L.Ed.2d 824, quoting *Purkett v. Elem* (1995), 514 U.S. 765, 767-768, 115 S.Ct. 1769, 131 L.Ed.2d 834.

{¶ 35} The court's finding of no discriminatory intent is not clearly erroneous. The prospective juror harbored serious doubts about the fairness of the criminal justice system and repeatedly struggled when asked if he could fairly sit as a juror. That alone justified the court's conclusions, as a

prospective juror's equivocal answers or expressions of uncertainty about impartiality or matters pertinent to the case are sufficiently race-neutral reasons for exercising a peremptory challenge. *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 896 N.E.2d 699, at ¶65.

V

{¶ 36} The fifth assignment of error complains that the court erred by denying Bankston's motion for judgment of acquittal. Although most of her argument within this assignment goes to the manifest weight of the evidence (the court's reliance on hearsay, the accuracy of the loss prevention specialist's identification of Bankston from videotape, the state's failure to produce the videotape), she does sufficiently set forth an argument that the state failed to offer evidence of an intent to defraud.

A

{¶ 37} When reviewing a claim that there is insufficient evidence to support a conviction, we view the evidence in a light most favorable to the prosecution to determine whether 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.

B

{¶ 38} R.C. 2913.11(B) provides that "[n]o 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[.]" A person who issues a check "is presumed to know that it will be dishonored if * * * [t]he check * * * 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 * * * is not discharged by payment or satisfaction within ten days after receiving notice of dishonor." R.C. 2913.11(C)(2).

{¶ 39} Both of the checks at issue in this case were returned for insufficient funds and Bankston did not make good on the checks within ten days after receiving notice that they had been dishonored, so she is presumed to know that the checks would be dishonored.

{¶ 40} Bankston argues that the presumption should not hold because she had access to sufficient funds in both bank accounts to cover the checks. She maintains that First Merit Bank extended her a $23,250 line of credit to cover her drafts. While that line of credit did exist, a First Merit statement showed the balance on that line of credit on January 10, 2007 as $23,933.69. So as of the time she wrote the check, Bankston had exceeded her applicable line of credit with First Merit, and therefore no funds were available to pay the check.

{¶ 41} Bankston likewise argues that her Charter One account had "positive balances at various times" during January 2007, and that on January 30, 2007 she had an available balance of $1,088.34. This argument ignores Bankston's checking account history with Charter One: in 21 days prior to writing the January 31, 2007 check, Charter One had charged her five separate fees for insufficient funds and eight separate fees for overdrafts. "Where a defendant has no reasonable ground to believe the funds in his bank account are sufficient to cover checks issued, an inference of intent to defraud arises." *State v. Bergsmark*, 6th Dist. No. L-03-1137, 2004-Ohio-5753, at ¶15, citing *State v. Hines* (July 3, 1995), 12th Dist. No. CA94-09-182. Bankston's Charter One account showed that she had a clear history of writing checks when she had insufficient funds, so a rational trier of fact could determine that Bankston failed to rebut the R.C. 2913.11(C)(2) presumption that she intended to defraud the department store by writing bad checks.

VI

{¶ 42} For her sixth assignment of error, Bankston complains that the jury's verdict is against the manifest weight of the evidence. She argues that neither of the department store clerks who accepted the checks for payment testified at trial, that the missing videotapes created a doubt as to the identity of the person writing the checks, and the bank representatives lacked first-hand knowledge of either transaction.

A

{¶ 43} The manifest weight of the evidence standard of review requires us to review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact 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. Otten* (1986), 33 Ohio App.3d 339, 340, 515 N.E.2d 1009. The use of the word "manifest" means that the trier of fact's decision must be plainly or obviously contrary to all of the evidence. This is a difficult burden for an appellant to overcome because the resolution of factual issues resides with the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. The trier of fact has the authority to "believe or disbelieve any witness or accept part of what a witness says and reject the rest." *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548.

B

{¶ 44} In closing argument, defense counsel assailed the loss prevention specialist's identification of Bankston from a videotape, noting that the existence of the videotape remained in doubt given that the police had no record of ever receiving it.

{¶ 45} If the videotape had been the loss prevention specialist's only viewing of Bankston, there might have been an argument to discredit the identification. But Bankston admittedly appeared at the department store two months after her checks were returned for insufficient funds and spoke to the loss prevention specialist. This created an independent basis for the loss prevention specialist's identification of Bankston as the person appearing on the videotape. Bankston argued her case of mistaken identity by claiming that she had been a victim of checking account fraud, but it is telling that no evidence was offered that she reported this alleged crime to the police. In any event, she undermined her own credibility by satisfying a debt that she alleged had been fraudulently incurred by another.

{¶ 46} We also find no basis for Bankston's challenge to the testimony of bank employees who identified statements from their respective banks as not being based on first-hand knowledge of her transactions with the department store. Both employees conceded that they had no first-hand knowledge of the two transactions at the department store, but the state did not offer their testimony for that purpose. The employees testified for the sole purpose of identifying bank statements from Bankston's accounts as records kept in the normal course of business — records that would provide essential evidence on the passing bad checks counts. Those bank statements spoke for themselves

and required no first-hand knowledge by the employees as a predicate for admission into evidence.

{¶ 47} Finally, the absence at trial of the two department store clerks who handled Bankston's transactions was not an omission that causes us to question the jury's verdict. At best, the two clerks would only have added to the loss prevention specialist's identification. While this might have given added weight to the identification, it would not have done so in a critical way. The uncontested evidence showed that Bankston returned to the store, spoke with the loss prevention specialist, and paid the outstanding debt: all acts that tended to show her involvement. Bankston made no serious claim that she was not the person who signed both checks, and by paying off the debt to the department store, she showed that there was no actual controversy as to whether the transactions occurred. Hence, testimony by the department store clerks would have been unnecessary.

VII

{¶ 48} The seventh assignment of error complains that the court erred by denying Bankston's post-sentence motion to withdraw her guilty plea to vandalism in CR-515725. She argued that her guilty plea had been involuntary because counsel failed to advise her of the affirmative defense of necessity.

{¶ 49} A motion to withdraw a guilty plea is governed by the standards set forth in Crim.R. 32.1, which states: "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea."

{¶ 50} When a motion to withdraw a guilty plea is made after sentencing, the court may only grant the motion "to correct manifest injustice." Id.; *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324, paragraph one of the syllabus. A manifest injustice has been defined as a "clear or openly unjust act." *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 208, 1998-Ohio-271, 699 N.E.2d 83. Under the manifest injustice standard, a post-sentence withdrawal motion is allowable only in extraordinary cases. *Smith*, 49 Ohio St.2d at 264. "A motion made pursuant to Crim.R. 32.1 is addressed to the sound discretion of the trial court, and the good faith, credibility and weight of the movant's assertions in support of the motion are matters to be resolved by that court." Id., at paragraph two of the syllabus. We therefore review a trial court's refusal to allow a post-sentence motion to withdraw a guilty plea for an abuse of discretion. *State v. Xie* (1992), 62 Ohio St.3d 521, 527, 584 N.E.2d 715.

{¶ 51} Count 1 of the indictment in CR-515725 charged vandalism under R.C. 2909.05(B)(1)(b): that Bankston knowingly caused physical harm to

property owned or possessed by the city of Highland Heights Police Department. It appears that Bankston broke the window of the police car while being detained on suspicion of shoplifting. In her motion to withdraw the plea, Bankston claimed that she broke the car window because she "was left in a police cruiser for an extended period of time with no ventilation on a hot summer day" and that she began to "hyperventilate." Defense counsel argued that Bankston's guilty plea was uninformed because Bankston had not been told that the defense of necessity[2] would be available to her.

{¶ 52} The court held a hearing on the motion to withdraw the guilty plea. Defense counsel conceded that the court had complied with Crim.R. 11 during the vandalism plea colloquy, so Bankston was essentially making an ineffective assistance of counsel argument — that counsel failed to advise her of an applicable affirmative defense. Ineffective assistance of counsel can constitute manifest injustice sufficient to allow the post-sentence withdrawal of a guilty plea. *State v. Dalton*, 153 Ohio App.3d 286, 2003-Ohio-3813, 793 N.E.2d 509, at ¶18.

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[2]The affirmative defense of "necessity" or "duress" consists of "any conduct which overpowers a person's will and coerces or constrains his performance of an act which he otherwise would not have performed. Consequently, one who, under the pressure of a threat from another person, commits what would otherwise be a crime may, under certain circumstances, be justified in committing the act and not be guilty of the crime." *State v. Grinnell* (1996), 112 Ohio App.3d 124, 144-45, 678 N.E.2d 231. This defense requires a sense of immediate, imminent death or serious bodily injury if the actor does not commit the act as instructed. *State v. Cross* (1979), 58 Ohio St.2d 482, 487, 391 N.E.2d 319.

{¶ 53} Even though the ineffective assistance of counsel can be a basis for withdrawing a guilty plea, the defendant bears the burden of showing that counsel's performance led to a manifest injustice. *Smith*, 49 Ohio St.2d 261, at paragraph one of the syllabus. Ordinarily, evidence outside the record of the guilty plea hearing is required to prove a claim of ineffective assistance of counsel, so the claim is usually one better suited for a postconviction relief proceeding.[3] See *State v. Gibson* (1980), 69 Ohio App.2d 91, 95, 430 N.E.2d 954. Bankston did not offer her own affidavit or any other evidentiary material in support of the motion. And despite having advance notice that the court was conducting a hearing on the motion to withdraw the guilty plea, she did not offer any evidence or testimony during the hearing on the motion. She did advise the court during the hearing that she "could produce at least three or four witnesses" who would testify to the circumstances under which she had been detained in the police cruiser, but those witnesses did not testify. Without that testimony or Bankston's affidavit, the court had no evidentiary basis to show the circumstances inside the police cruiser that would justify Bankston's assertion that counsel was ineffective for failing to advise her of the defense of necessity. Consequently, there was no proof before the court to

[3]In a subsequent petition for postconviction relief, Bankston raised this same issue of ineffective assistance of counsel and offered affidavits from others who claimed to have witnessed the events leading to the vandalism charge. The court denied relief and that ruling is currently on appeal in Appeal No. 94364.

show that her guilty plea resulted in a manifest injustice. The court did not abuse its discretion by refusing to permit a post-sentence withdrawal of the guilty plea.

VIII

{¶ 54} The eighth assignment of error raises three separate complaints concerning the effectiveness of counsel: (1) counsel failed to object to testimony by a police detective; (2) counsel did not request a jury instruction on identification; and (3) counsel did not object to hearsay.

A

{¶ 55} A claim of ineffective assistance of counsel requires a defendant to show that (1) the performance of defense counsel was seriously flawed and deficient and (2) the result of the defendant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. This requires two distinct lines of inquiry. First, we determine "whether there has been a substantial violation of any of defense counsel's essential duties to his client[.]" *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus. When making this inquiry, we presume that licensed counsel has performed in an ethical and competent manner. *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 209 N.E.2d 164. Second, we determine whether "the defense was prejudiced by counsel's ineffectiveness."

Bradley, 42 Ohio St.3d at paragraph two of the syllabus. Prejudice requires a showing to a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at paragraph three of the syllabus.

B

{¶ 56} Bankston first complains that counsel failed to object to a police detective's testimony that recounted statements Bankston made to him. In its response to Bankston's discovery request, the state indicated that Bankston gave neither a written nor an oral statement. However, the police detective testified that he spoke with Bankston in July 2008, after she had been reindicted for passing bad checks, and that Bankston told him "I made good on the bad checks, and now I'm being reindicted for the bad checks. I don't understand why I'm being reindicted."

{¶ 57} "[T]he failure to make objections is not alone enough to sustain a claim of ineffective assistance of counsel." *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, at ¶101. The defendant must still show that counsel violated an essential duty to the client and that he was materially prejudiced by the error. *State v. Holloway* (1988), 38 Ohio St.3d 239, 244, 527 N.E.2d 831.

{¶ 58} Bankston did not show that defense counsel violated an essential duty by failing to object to the police detective's testimony that Bankston made

good on the two checks that were returned for insufficient funds. Regardless of whether the state erred by failing to inform the defense that Bankston had made an oral statement to the detective, defense counsel obviously knew that Bankston paid the department store because he mentioned that fact during his opening statement to the jury: "my client did pay this debt. For whatever reason she felt necessary, she paid this debt." The loss prevention specialist also testified that Bankston paid off the debt. So the detective's testimony to that same effect would not have come as any surprise to Bankston, and counsel therefore had no duty to object.

C

{¶ 59} Bankston next argues that defense counsel should have requested a jury instruction on the loss prevention specialist's identification of Bankston because she initially viewed Bankston on a videotape that could not be located.

{¶ 60} In *State v. Guster* (1981), 66 Ohio St.2d 266, 421 N.E.2d 266, the syllabus states:

{¶ 61} "A trial court is not required in all criminal cases to give a jury instruction on eyewitness identification where the identification of the defendant is the crucial issue in the case and is uncorroborated by other evidence. A trial court does not abuse its discretion in deciding that the factual issues do not require, and will not be assisted by, the requested

instructions, and that the issue of determining identity beyond a reasonable doubt is adequately covered by other instructions."

{¶ 62} Had the loss prevention specialist only seen Bankston from the videotape, there might have been an issue on eyewitness identification. But the loss prevention specialist met face-to-face with Bankston and later identified her at trial. Moreover, Bankston admitted at trial that she paid off the debt to the department store, thus undercutting her claim that she was the victim of a fraud on her checking account. There was no real issue as to Bankston's identity, so counsel could rationally have concluded that the facts would not support an instruction on eyewitness identification. By so concluding, counsel did not violate an essential duty.

D

{¶ 63} Finally, Bankston complains that counsel should have objected to the hearsay testimony of the bank employees who identified statements from their respective employers on accounts held by Bankston. We summarily reject this argument for the reasons stated in Part I of this opinion: those records fell within the Evid.R. 803(6) hearsay exception, so an objection would have been unavailing. See *State v. Mitchell* (1988), 53 Ohio App.3d 117, 119, 559 N.E.2d 1370 ("[A] trial attorney does not violate any substantial duty in failing to make futile requests or objections.").

IX

{¶ 64} In her ninth assignment of error, Bankston complains that the court erred by sentencing her to consecutive sentences without first making findings as required by former R.C. 2929.14(E)(4). Although recognizing that the Ohio Supreme Court found R.C. 2929.14(E)(4) to be unconstitutional in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, Bankston maintains that the United States Supreme Court decision in *Oregon v. Ice* (2009), ___ U.S. ___, 129 S.Ct. 711, 172 L.Ed.2d 517, revives R.C. 2929.14(E)(4).

{¶ 65} We need not engage in a discussion on the merits of Bankston's claim that *Ice* has revived R.C. 2929.14(E)(4). The United States Supreme Court released *Ice* on January 14, 2009; the court sentenced Bankston on January 8, 2009. So at the time of her sentencing, *Foster* was still the law in Ohio as *Ice* had yet to be released. See *State v. Pinkney*, 8th Dist. No. 91861, 2010-Ohio-237, at ¶15. The court therefore had no duty to consider factors from former R.C. 2929.14(E)(4) before imposing consecutive sentences.[4]

X

{¶ 66} For her tenth assignment of error, Bankston complains that she was sentenced to jail time on a "presumptively probationable" offense because

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[4]The Ohio Supreme Court recently decided to hear the *Ice/Foster* issue in *State v. Hodge*, Supreme Court No. 2009-1997. The court certified the following proposition of law: "Before imposing consecutive sentences, Ohio trial courts must make the findings of fact specified by R.C. 2929.14(E)(4) to overcome the presumption favoring concurrent sentences in R.C. 2929.41(A)."

the judge considered her a "textbook con artist who cons the system." Bankston argues that this was an improper and unconstitutional consideration by the trial judge.

{¶ 67} In *Foster*, the supreme court held that "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *Foster* at paragraph seven of the syllabus; *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, at paragraph three of the syllabus. *Foster*, however, speaks only to the former statutory requirements for imposing certain types of sentences — it does not purport to address a trial judge's long-standing discretion to comment on the defendant's actions and state reasons or factors that have led the judge to impose a particular sentence.

{¶ 68} Due process requires a fair proceeding before an unbiased judge, but a claim of bias rises to the level of constitutional significance only in an extreme case, such as where the judge has "'a direct, personal, substantial, pecuniary interest'" in the outcome. *Aetna Life Ins. Co. v. Lavoie* (1986), 475 U.S. 813, 821-22, 824, 106 S.Ct. 1580, 89 L.Ed.2d 823, quoting *Tumey v. Ohio* (1927), 273 U.S. 510, 523, 47 S.Ct. 437, 71 L.Ed. 749. "The term 'bias or prejudice,' when used in reference to a judge, 'implies a hostile feeling or spirit of ill will or undue friendship or favoritism toward one of the litigants or his

attorney, with the formation of a fixed anticipatory judgment on the part of the judge, as contra distinguished from an open state of mind which will be governed by the law and the facts.'" *State v. Bonnell*, 8th Dist. No. 91785, 2009-Ohio-2721, at ¶6, quoting *State ex rel. Pratt v. Weygandt* (1956), 164 Ohio St. 463, 132 N.E.2d 191, paragraph four of the syllabus.

{¶ 69} The statement at issue here — that Bankston was a "textbook con artist who cons the system" — was made during sentencing after the court discovered that Bankston had been given a court-appointed attorney in CR-515725 despite her ownership of considerable financial assets. Bankston had been pleading her case for leniency by telling the court that she was a responsible citizen who owned "seven rental properties." At that point, the court learned that Bankston retained counsel in CR-508144, but that the public defender had been appointed to represent her in CR-515725. The court asked retained counsel if there had been any discussion about his representation in CR-515725. Retained counsel said that he and Bankston discussed his retention in CR-515725, but Bankston said that she could not afford to hire him on the second case. Retained counsel agreed that as an officer of the court, he would not have allowed the public defender to represent Bankston in CR-515725 had he known that Bankston had the financial means to hire her own attorney in that case. In response, the court stated:

{¶ 70} "Okay. Ma'am, you are the textbook con artist. You're good-looking, you're articulate, you're intelligent, but you use your intelligence to con others out of everything. * * * You conned the system into giving you a public defender by refusing to retain an attorney for two cases, but only for one. That's it."

{¶ 71} The court's comment fell within the bounds of acceptable conduct when formulating a sentence and did not show bias or prejudice against Bankston. The court heard the evidence against Bankston and thought that her acceptance of a court-appointed attorney despite having considerable assets called into question her claims of reformed conduct. In *Liteky v. United States* (1994), 510 U.S. 540, 550-551, 114 S.Ct. 1147, 127 L.Ed.2d 474, the United States Supreme Court stated:

{¶ 72} "The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task. As Judge Jerome Frank pithily put it: 'Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those

court-house dramas called trials, he could never render decisions.' *In re J.P. Linahan, Inc.*, 138 F.2d 650, 654 (CA2 1943)."

{¶ 73} This is not a case where the court's remarks showed bias or partiality. Bankston's seeming manipulation of the appointed counsel system informed the court's sentencing decision. When considered in conjunction with evidence that Bankston had regularly overdrawn her checking accounts, the intent to "con" the system was a rational deduction by the court and well within the bounds of what the court could, in its discretion, consider as a factor in sentencing.

{¶ 74} 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 issue out of this court directing the Cuyahoga County Court of Common Pleas 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.

MELODY J. STEWART, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and

LARRY A. JONES, J., CONCUR